UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURE DECISIONS

DECISIONS OF THE SECRETARY OF AGRICULTURE

ISSUED UNDER THE

REGULATORY LAWS ADMINISTERED BY THE

UNITED STATES DEPARTMENT OF AGRICULTURE

(Including Court Decisions)

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PREFATORY NOTE

The purpose of this official publication is to make available to the public, in an orderly and accessible form, decisions and orders issued by the Secretary of Agriculture, or those officers authorized by law to act in his stead, under laws administered by the Department of Agriculture.

The decisions published herein result from formal adjudicatory administrative proceedings instituted by the Department, under designated statutes and regulations, after notice and hearing or opportunity for a hearing. This publication does not include rules and regulations which are required to be published in the Federal Register.

Consent decisions entered subsequent to December 31, 1986 are not published herein. These Consent decisions are on file and may be inspected upon request to the Hearing Clerk, Office of Administrative Law Judges. However, a list of these decisions is published herein. (53 F.R. 6999, March 4, 1988)

The principal statutes concerned are the Agricultural Marketing Act of 1946 (7 U.S.C. 1621 *et seq.*), the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 601 *et seq.*), Animal Quarantine and Related Laws (21 U.S.C. 111 *et seq.*), the Animal Welfare Act (7 U.S.C. 2131 *et seq.*), the Federal Meat Inspection Act (21 U.S C. 601 *et seq.*), the Grain Standards Act (7 U.S.C. 1821 *et seq.*), the Horse Protection Act (15 U.S.C. 1821 *et seq.*), the Packers and Stockyards Act, 1921, (7 U.S.C. 181 *et seq.*), the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499a *et seq.*), the Plant Quarantine Act (7 U.S C. 151 et seq.), the Poultry Products Inspection Act (21 U S.C. 451 et seq.), and the Virus-Serum-Toxin Act of 1913 (21 U.S.C. 151-158).

The decisions published herein are arranged alphabetically by statute and within the statute section by date of issue or date the decision became final after expiration of the appeal period. They may be cited by giving the volume number and page number, for illustration 1 A.D. 472 (1942). It is unnecessary to cite the docket or decision number. Prior to 1942 the Secretary's decisions were identified by docket and decision numbers, for example D-578; S. 1150. Such citation of a case in these volumes generally indicates that the decision is not published in Agriculture Decisions.

This publication also contains current court decisions of interest involving the regulatory laws administered by the Department.

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ANIMAL QUARANTINE ACT

In re: LEONARD MCDANIEL, JACK STEWART, and LOUISE STEWART, d/b/a L&W CATTLE CO. A.Q. Docket No. 257. Order filed February 25, 1987.

William Jenson, for complainant.

Carl E. LeForce, Idabel, Oklahoma, for respondent.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER MODIFYING ORIGINAL ORDER AS TO LEONARD MCDANIEL

By agreement of the parties, the order previously filed in this proceeding is hereby modified to read as follows:

Respondent Leonard McDaniel is assessed a civil penalty of $4,000 ($1,000 per violation), which shall be payable to the "Treasurer of the United States," by certified check or money order, and shall be sent to USDA, APHIS, Field Servicing Office (FSO), Accounting Service, Butler Square West, 5th Floor, 100 North 6th Street, Minneapolis, Minnesota 55403, in accordance with the following payment schedule:

> $200 to be received by FSO on or before April 1, 1987, and $50 to be received monthly by FSO on or before the first day of each month beginning May 1, 1987, until the balance of the $4,000 civil penalty assessed herein is paid.

In re: JOHNNY DAVIS. P. & S. Docket No. 6728. Decision filed December 30, 1986.

Dealer—Insufficient funds checks—Failure to pay—Suspended as registrant—Default.

Roberta Swartzendruber, for complainant.

Respondent, *pro se*.

Decision issued by John A. Campbell, Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION O FACTS BY REASON OF DEFAULT

Preliminary Statement

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent willfully violated the Act and regulations promulgated thereunder (9 C.F.R. § 201.1 *et seq.*).

Copies of the complaint and Rules of Practice (7 C.F.R. § 1.130 *et seq.*) governing proceedings under the Act were served upon respondent by the Hearing Clerk by regular mail after attempts to serve the respondent by certified mail were unsuccessful. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. (a) Johnny Davis, hereinafter referred to as the respondent, is an individual whose mailing address is Route 5, Box 726, Winnsboro, Louisiana 71295.

(b) The respondent is, and at all times material herein was:

(1) Engaged in the business of a dealer, buying and selling livestock in commerce for his own account; and

(2) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

2. (a) Respondent, in connection with his operations subject to the Act, on or about the dates and in the transactions set forth in paragraph II of the complaint, purchased livestock and in purported payment therefor issued checks which were returned unpaid by the bank upon which they were drawn because the respondent did not have and

maintain sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks.

(b) Respondent, in connection with his operations subject to the Act, on or about the dates and in the transactions set forth in paragraph II(a) of the complaint, and in the transactions specified in paragraph II(b) of the complaint, purchased livestock and failed to pay, when due, the full purchase price of such livestock.

(c) As of May 29, 1986, there remained unpaid a total of approximately $40,382.04 for the livestock purchases set forth in paragraph II(a) and (b) of the complaint.

Conclusions

By reason of the facts found in Finding of Fact 2 herein, respondent has wilfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b).

Order

Respondent Davis, his agents and employees, directly or through any corporate or other device, in connection with his operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available in the bank account upon which they are drawn to pay the checks when presented;

2. Failing to pay, when due, for livestock purchases; and

3. Failing to pay for livestock purchases.

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In re: ENSHALLAH CA
VANTES, III, and DWIG
Decision filed November

**Dealer—Issuing insuffici
requirement—Accounts a
ject to the Act—Default.**

In re: JOHNNY DAVIS. P. & S. Docket No. 6728. Decision filed December 30, 1986.

Dealer—Insufficient funds checks—Failure to pay—Suspended as registrant—Default.

Roberta Swartzendruber, for complainant.

Respondent, *pro se*

Decision issued by John A. Campbell, Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION O FACTS BY REASON OF DEFAULT

Preliminary Statement

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent willfully violated the Act and regulations promulgated thereunder (9 C.F.R. § 201.1 *et seq.*).

Copies of the complaint and Rules of Practice (7 C.F.R. § 1.130 *et seq.*) governing proceedings under the Act were served upon respondent by the Hearing Clerk by regular mail after attempts to serve the respondent by certified mail were unsuccessful. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. (a) Johnny Davis, hereinafter referred to as the respondent, is an individual whose mailing address is Route 5, Box 726, Winnsboro, Louisiana 71295.

(b) The respondent is, and at all times material herein was:

(1) Engaged in the business of a dealer, buying and selling livestock in commerce for his own account; and

(2) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

2. (a) Respondent, in connection with his operations subject to the Act, on or about the dates and in the transactions set forth in paragraph II of the complaint, purchased livestock and in purported payment therefor issued checks which were returned unpaid by the bank upon which they were drawn because the respondent did not have and

maintain sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks.

(b) Respondent, in connection with his operations subject to the Act, on or about the dates and in the transactions set forth in paragraph II(a) of the complaint, and in the transactions specified in paragraph II(b) of the complaint, purchased livestock and failed to pay, when due, the full purchase price of such livestock.

(c) As of May 29, 1986, there remained unpaid a total of approximately $40,382.04 for the livestock purchases set forth in paragraph II(a) and (b) of the complaint.

Conclusions

By reason of the facts found in Finding of Fact 2 herein, respondent has wilfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b).

Order

Respondent Davis, his agents and employees, directly or through any corporate or other device, in connection with his operations subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available in the bank account upon which they are drawn to pay the checks when presented;
2. Failing to pay, when due, for livestock purchases; and
3. Failing to pay for livestock purchases.

Respondent is suspended as a registrant [illegible]
five years, provided, however, that [illegible]
Stockyards Administration, [illegible]
nating this suspension at any time after the expiration of 90 days upon demonstration that all unpaid livestock sellers have been paid in full; and provided further that this order may be modified upon application to the Packers and Stockyards Administration to permit the salaried employment of respondent by another registrant after the expiration of the 90 day period of suspension.

This decision and order shall become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service (7 C.F.R. §§ 1.139, 1.145).

Copies hereof shall be served on the parties.

[This decision and order became final February 6, 1987.—Editor]

In re: ENSHALLAH CATTLE COMPANY, INC., A.A. "BUD" CERVANTES, III, and DWIGHT JEFCOAT. P. & S. Docket No. 6622. Decision filed November 18, 1986.

Dealer—Issuing insufficient funds checks—Failure to pay—Bonding requirement—Accounts and records—Prohibited from operating subject to the Act—Default.

DECISION AND ORDER WITH RESPECT TO DWIGHT JEFCOAT UPON ADMISSION OF FACTS BY REASON OF DEFAULT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondents wilfully violated the Act and the regulations promulgated thereunder by the Secretary of Agriculture (9 C.F.R. § 202 .1 *et seq.*).

Copies of the complaint and Rules of Practice (7 C.F.R. § 1.130 *et seq.*) governing proceedings under the Act were served on respondent Dwight Jefcoat by certified mail. Respondent Dwight Jefcoat was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent Dwight Jefcoat has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent Dwight Jefcoat's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. (a) Enshallah Cattle Company, Inc., hereinafter referred to as the corporate respondent, is a corporation incorporated under the laws of the State of Mississippi, with its principal place of business in Poplarville, Mississippi. The business mailing address of the corporation is P.O. Box 209, Poplarville, Mississippi 39470.

(b) Corporate respondent is, and at all times material herein was engaged in the business of buying and selling livestock in commerce for its own account.

2. (a) Dwight Jefcoat is an individual whose business address is Route 2, Carriere, Mississippi 39426.

(b) Dwight Jefcoat is, and at all times material herein was:

(1) Engaged in the business of buying and selling livestock for his own account;

(2) Secretary/Treasurer of the corporation; and

(3) Jointly responsible for the direction, management and control of the corporate respondent with A.A. "Bud" Cervantes III.

3. Corporate respondent, under the partial direction, management and control of Dwight Jefcoat, in connection with its operations as a dealer, on or about the dates and in the transactions set forth in paragraph III of the complaint, issued checks in payment for the purchase of livestock, which checks were returned unpaid by the bank upon which they were drawn because the corporate respondent did not have

and maintain sufficient funds on deposit and available in the accoun
pay the checks when presented.

4. (a) Corporate respondent, under the partial direction, mana
ment and control of Dwight Jefcoat, on or about the dates and in
transactions specified in paragraph IV of the complaint, and in num
ous additional transactions, purchased livestock and failed to pay, w
due, the full purchase price for such livestock.

(b) As of June 28, 1985, there remained unpaid by responde
total of at least $217,996.68 for livestock purchases.

5. The corporate respondent was notified by certified mail that it
required to furnish and maintain a surety bond in connection wit
livestock transactions in order to continue its livestock operation
commerce as a person subject to the Act. Notwithstanding such no
the corporate respondent, under the partial direction, management
control of Dwight Jefcoat, has continued to engage in the business
dealer without securing, having and maintaining an adequate bon
its equivalent as required by the Act and the regulations.

6. The corporate respondent, under the partial direction, man
ment and control of Dwight Jefcoat, during the period February 1
through May 1985, in connection with its operations subject to the
failed to keep and maintain accounts, records and memoranda w
fully and correctly disclosed all transactions involved in its busin
Corporate respondent, during such period failed to keep and maint
purchase invoices, accounts
ments, livestock advances
make-up records, worksh
records, a general ledger,
ments journal.

By reason of the facts found in Findings of Fact 3 and 4 her
respondent Dwight Jefcoat has wilfully violated sections 312(a) and
of the Act (7 U.S.C. §§ 213(a), 228b).

By reason of the facts found in Finding of Fact 5 herein, respon
Dwight Jefcoat has wilfully violated section 312(a) of the Act (7 U.
§ 213(a)), and sections 201.29 and 201.30 of the regulations (9 C.
§§ 201.29, 201.30).

By reason of the facts found in Finding of Fact 6, herein, respon
Dwight Jefcoat has wilfully violated section 401 of the Act (7 U.S.
221).

Order

Respondent Dwight Jefcoat, his agents or employees, directl
through any corporate or other device, shall cease and desist fro

1. Issuing checks in payment for livestock without having
maintaining sufficient funds to pay such checks upon presentmen

2. Failing to pay, when due, for livestock purchases;

3. Failing to pay for livestock purchases; and

4 Engaging in business in any capacity for which bonding is required under the Act without having and maintaining an adequate bond or bond equivalent.

Respondent shall keep and maintain accounts, records and memoranda which fully and correctly disclose the true nature of all transactions involved in any business in which he is subject to the Packers and Stockyards Act, including purchases invoices, accounts of sale, scale tickets, contracts, agreements, livestock advances, health records, freight bills, feed bills, load make up records, worksheets, records of accounts payable, inventory records, a general ledger, a cash receipts journal, and a cash disbursements journal.

Respondent Dwight Jefcoat is prohibited from operating subject to the Act for a period of six months and thereafter until such time as he complies fully with the registration and bonding requirements under the Act and the regulations. When respondent Jefcoat demonstrates that he is in full compliance with such registration and bonding requirements, a supplemental order will be issued in this proceeding terminating this prohibition.

This decision and order shall become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service (7 C.F.R. §§ 1.139, 1.145).

Copies hereof shall be served on the parties.

[This decision and order became final February 27, 1987.—Editor.]

MISCELLANEOUS DISCIPLINARY DECISIONS

In re: LYLE E. MECHHOFER P&S Docket No. 6801. Order filed February 11, 1987.

Order issued by William J. Weber, Administrative Law Judge.

ORDER DISMISSING THE COMPLAINT

Complainant filed a Motion to dismiss the complaint on the ground that respondent is now deceased.

IT SHOULD BE AND HEREBY IS ORDERED that the complaint is dismissed without prejudice.

In re: ALBERT COTTA. P. & S. Docket No. 6790. Order filed February 17, 1987.

Order issued by Dorothea A. Baker, Administrative Law Judge.

SUPPLEMENTAL ORDER

On February 6, 1987, an order was issued in the above-captioned matter which, *inter alia*, suspended respondent as a registrant under the Act until such time as he demonstrates that he is in full compliance with the bonding requirements under the Act and the regulations.

Respondent is now in full compliance with such bonding requirements. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued February 6, 1987, is terminated. The order shall remain in full force and effect in all other respects.

In re: CHARLES S. WHEATON. P. & S. Docket No. 6838. Order filed February 26, 1987.

Order issued by John A. Cambell, Administrative Law Judge.

ORDER OF DISMISSAL

Upon motion of complainant, and it appearing that the respondent was in compliance with the bonding requirements of the Packers and Stockyards Act (7 U.S.C. 3 § 181 *et seq.*) and the regulations (9 C.F.R. § 201.1 *et seq.*) prior to the issuance of the complaint, this proceeding is hereby dismissed without prejudice.

DISCIPLINARY DECISIONS

In re: STAFOS FARMS, INC , a/t/a, S.F., INC., and S.F., INC., OF KANSAS. PACA Docket No. 2-7247. Decision and order filed December 19, 1986.

Failure to pay promptly—Publication of the facts.

Respondent purchased fruits and vegetables in interstate and foreign commerce but failed to make full payment promptly for these commodities Official notice was taken of respondent's petition and schedules filed in Bankruptcy Court. A finding was made that respondent committed willful, flagrant and repeated violations of the Act. The facts and circumstances were ordered published.

Andrew Y. Stanton, for complainant.

Kenneth P. Soden, Mission, Kansas, for respondent.

Decision by Victor W. Palmer, Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on July 30, 1986, by th e Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period January 1984 through October 1984, respondent purchased, received, and accepted, in interstate and foreign commerce, from 16 sellers, 120 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $642,491.38.

Complainant further alleged that such actions were willful, flagrant and repeated violations of section 2 of the Act, and requested that a finding be made that respondent has committed willful, flagrant and repeated violations of the Act, and that such findings be published.

[illegible] 25 1986 Respondent filed an answer in which it admitted
that its former trade name was Stafos
ss was 6235 Kansas Avenue, Kansas
ld a PACA license issued under the
bankruptcy on August 2, 1984. It
ding that this proceeding violates the
y proceedings, and requested a hear-

ainant filed a motion for decision on
morandum and uncertified copies of
in the bankruptcy proceedings. An
ision on the pleadings was entered on
s asserted by respondent that official

notice may not be taken of documents, under the Rules of Practice, that are not evidenced by a certified copy. However, the initial denial placed respondent on notice that once properly certified copies are supplied, controlling departmental decisions require the issuance of a decision and order of the type complainant proposed. Copies of pertinent departmental decisions were provided to respondent as attachments to the initial denial.

On November 26, 1986, complainant filed properly certified copies of the respondent's bankruptcy schedules and renewed its motion for decision on the pleadings. Respondent filed a response to the renewed motion in which it asserted that complainant had not sustained its burden of proof that respondent had failed to make prompt payment since there was evidence, which it submitted, that a major produce seller had agreed to give respondent credit terms.

Firstly, official notice is taken of the petition and schedules filed by respondent in the Bankruptcy Court for the District of Kansas (Case No. 84-20073), evidenced by duly certified copies which are herewith incorporated and made part of this record. Those schedules and the statements of respondent, show that many produce sellers were not paid *in full* which makes requisite under applicable departmental policy, the entry of the findings requested by complainant. Respondent itself pointed out that one produce seller, Tanaka Brothers Farms, Inc., was owed $989,076.47, but received instead of full payment, satisfaction in respect to only the $244,597.75 part of the claim that constituted a trust lien leaving a $744,478.72 balance which was treated as a non-trust lien claim that was left unpaid.

Accordingly, the following finding, conclusions, and order are being entered.

Findings of Fact

1. Respondent, Stafos Farms, Inc., a/t/a S.F., Inc., and S.F., Inc., of Kansas, is a corporation, whose address is 6235 Kansas Avenue, Kansas City, Kansas 66111.

2. Pursuant to the licensing provisions of the Act, license number 762162 was issued to respondent on September 1, 1976. This license was renewed annually, but terminated on March 5, 1985, pursuant to section 4(a) of the Act (7 U.S.C. 499d(a)) when respondent failed to pay the required annual license fee.

3. As more fully set forth in paragraph 5 of the complaint, during the period January 1984 through October 1984, respondent purchased, received, and accepted in interstate and foreign commerce, from 16 sellers, 120 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $642,491.38.

Conclusions

Respondent's failure to make full payment promptly with respect to the transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of section 2 of the Act (7 U.S.C. 499b), for which the Order below is issued.

Order

A finding is made that respondent has committed willful, flagrant and repeated violations of section 2 of the Act (7 U S.C. 499b), and the facts and circumstances set forth above, shall be published.

This Order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. 1.139 and 1.145).

Copies hereof shall be served upon parties.

[This decision and order became final February 2, 1987.—Editor]

In re: HARRY KLEIN PRODUCE CORP. PACA Docket No. 2-6992. Decision and order filed February 6, 1987.

Failure to account truly and correctly to principals—Failure to make full payment promptly—Averaging or pooling of sales requires complete and accurate records and accountings—Complainant's use of an average sales price to estimate receipts is approved in view of respondent's incomplete records—Revocation of license.

The Judicial Officer affirmed Administrative Law Judge Victor W. Palmer's order revoking respondent's license for failure to account truly and correctly and make full payment to its principals and joint account partners in fiduciary transactions. Respondent kept a double set of books, and accounted to its principals and joint account partners on the basis of fictitious prices recorded in the false record. A violation is willful if, irrespective evil motive or erroneous advice, a person intentionally does an act prohibited by a statute or carelessly disregards the statute. Respondent had the burden of showing that it came within the exception to the prohibition in the regulations against averaging or pooling of sales. Averaging or pooling is explained. Where averaging or pooling is permitted, the regulations require the consignee's records and accountings to be complete and accurate. Private parties do not have the power to annul an act of congress or valid regulations. Complainant's use of an average sales price to estimate respondent's receipts, where respondent's records are incomplete, is "approved" (in a limited sense) notwithstanding the fact that it tends to maximize estimates of underpayments. Estimates made in similar circumstances have been approved on appeal from decisions by this Department and the Internal Revenue Service. It was not necessary to publish the average-sales-price approach in the Federal Register, in addition to the regulations that were published requiring respondent to keep accurate books and records. Unsworn statements (presumably prepared by respondent's counsel) have no probative value. Severe sanction policy is explained. Violations of a fiduciary duty are particularly serious.

Record keeping violations are serious since accurate records are essential to effective enforcement of a federal regulatory program. Evidence of current compliance with the Department's regulatory program is totally irrelevant in determining the sanction for past violations. This Department routinely denies requests for a lenient sanction based on the interests of respondent's customers, community or employees

Edward M. Silverstein, for complainant.

Steven P. McCarron, Silver Spring, Maryland, for respondent.

Initial decision by *Victor W. Palmer, Administrative Law Judge.*

Decision by Donald A Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*),[1] in which Administrative Law Judge Victor W. Palmer (ALJ) filed an initial Decision and Order on October 9, 1986, revoking respondent's license for failure to account truly and correctly and make full payment to its principals and joint account partners in fiduciary transactions. Respondent kept a double set of books, and accounted to its principals and joint account partners on the basis of fictitious prices recorded in the false record.

On November 13, 1986, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 C.F.R. § 2.35).[2] On December 9, 1986, the case was referred to the Judicial Officer for decision.

Oral argument before the Judicial Officer, which is discretionary (7 C.F.R. § 1.145(d)), was requested by respondent, but is denied inasmuch as the issues are not novel or difficult, the case has been thoroughly briefed, and oral argument would seem to serve no useful purpose.

Based upon a careful consideration of the entire record, the initial Decision and Order is adopted as the final Decision and Order in this case (with a few trivial changes), except that the effective date of the order is changed in view of the appeal. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

[1] *See generally* Campbell, *The Perishable Agricultural Commodities Act Regulatory Program*, in 1 Davidson, Agricultural Law, ch. 4 (1981 and 1986 Cum. Supp.), and Becker and Whitten, *Perishable Agricultural Commodities Act*, in 10 Harl, Agricultural Law, ch. 72 (1980).

[2] The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

Preliminary Statement

This is a disciplinary proceeding brought pursuant to the provisions of the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*; hereinafter the "PACA"); the regulations promulgated pursuant to the PACA (7 C.F.R. 46.1 through 46.45, hereinafter the "Regulations"); and the controlling rules of practice (7 C.F.R. 1.130 through 1.151). The proceeding was instituted by a complaint filed on October 25, 1985, by the Acting Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. The complaint charges that respondent Harry Klein Produce Corp. violated the PACA (7 U.S.C. 499b) by failing to account truly and correctly for 63 lots of produce received and accepted on consignment or on joint account, and by failing to make full payment promptly of the net proceeds for 51 lots of produce received and accepted on consignment and of the pro rata share of the net profits for six lots of produce received on joint account. Respondent filed an answer in which it denied violating the PACA.

Oral hearing was held before me on May 28-29, 1986, in New York, New York. Complainant was represented by Edward M.Silverstein, Esq., Office of the General Counsel, U. S.Department of Agriculture, Washington, D. C. 20250. Respondent was represented by Stephen P. McCarron, Esq., Sures, Dondero &McCarron, 8720 Georgia Avenue, Silver Spring, Maryland 20910.

Briefing was completed on September 19, 1986. Upon consideration of the evidence of record, the briefs, proposed findings and conclusions, and all arguments by the parties, an order is being issued revoking respondent's PACA license.

Pertinent Statutory Provisions

7 U.S.C. 499b

> It shall be unlawful in or in connection with any transaction in interstate or foreign commerce-
>
> * * * * *
>
> (4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, or any undertaking in connection with any

such transaction; or to fail to maintain the trust as required under Section 499e(c) of this title;

* * * * *

7 U.S.C. 499h(a)

Whenever (a) the Secretary determines, as provided in section 499(f) of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title . . ., the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

Pertinent Regulations

7 C.F.R. 46.2 Definitions.

* * * * *

(y) 'Truly and correctly to account' means, in connection with:

(1) Consignments, to account by rendering a true and correct statement showing the date of receipt and date of final sale, the quantities sold at each price, or other disposition of the produce, and the proper, usual or specifically agreed upon selling charges and expenses properly incurred or agreed to in the handling thereof, plus any other information required by 46.29;

(2) Joint account transactions, to account by rendering a true and correct statement showing the date of receipt and date of final sale, the quantities sold at each price or other disposition of produce, the joint account cost of the produce, and the expenses properly incurred or other charges specifically agreed to in the handling thereof, plus any other information required by 46.29;

* * * * *

(z) 'Account promptly,' except when otherwise specifically agreed upon by the parties, means rendering to the principal a true and correct accounting:

* * * * *

(2) In connection with consignment or joint account transactions, within 10 days after the date of final sale with respect to each shipment . .

*

(aa) 'Full payment p
in specifying the per
committing a viola
promptly,' for the p
[PACA], means;

(1) Payment of t
consignment or the pr
received on joint ac
which the final sale v

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

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Oral hearing was held before me on May 28–29, 1986, in New York, New York. Complainant was represented by Edward M.Silverstein, Esq., Office of the General Counsel, U. S.Department of Agriculture, Washington, D. C. 20250. Respondent was represented by Stephen P. McCarron, Esq., Sures, Dondero &McCarron, 8720 Georgia Avenue, Silver Spring, Maryland 20910.

Briefing was completed on September 19, 1986. Upon consideration of the evidence of record, the briefs, proposed findings and conclusions, and all arguments by the parties, an order is being issued revoking respondent's PACA license.

Pertinent Statutory Provisions

7 U.S.C. 499b

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce–

* * * * *

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any

such transaction; or to fail to maintain the trust as required under Section 499e(c) of this title;

* * * * *

7 U.S.C. 499h(a)

Whenever (a) the Secretary determines, as provided in section 499(f) of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title . . ., the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

Pertinent Regulations

7 C.F.R. 46.2 Definitions.

* * * * *

(y) 'Truly and correctly to account' means, in connection with:

(1) Consignments, to account by rendering a true and correct statement showing the date of receipt and date of final sale, the quantities sold at each price, or other disposition of the produce, and the proper, usual or specifically agreed upon selling charges and expenses properly incurred or agreed to in the handling thereof, plus any other information required by 46.29;

(2) Joint account transactions, to account by rendering a true and correct statement showing the date of receipt and date of final sale, the quantities sold at each price or other disposition of produce, the joint account cost of the produce, and the expenses properly incurred or other charges specifically agreed to in the handling thereof, plus any other information required by 46.29;

* * * * *

(z) 'Account promptly,' except when otherwise specifically agreed upon by the parties, means rendering to the principal a true and correct accounting:

* * * * *

(2) In connection with consignment or joint account transactions, within 10 days after the date of final sale with respect to each shipment . . .

* * * * *

(aa) 'Full payment promptly' is the term used in the [PACA] in specifying the period of time for making payment without committing a violation of the [PACA]. 'Full payment promptly,' for the purpose of determining violations of the [PACA], means:

(1) Payment of the net proceeds for produce received on consignment or the pro rata share of the net profits for produce received on joint account, within 10 days after the day on which the final sale with respect to each shipment is made;

* * * * *

7 C.F.R. 46.14 General.

(a) Every commission merchant, dealer, and broker shall prepare and preserve for a period of two years from the closing date of the transaction the accounts, records, and memoranda required by the [PACA], which shall fully and correctly disclose all transactions involved in his business. Licensees shall keep records which are adapted to the particular business that the licensee is conducting and in each case such records shall fully disclose all transactions in the business in sufficient detail as to be readily understood and audited. It is impracticable to specify in detail every class of records which may be found essential since many different types of business are conducted in the produce industry and many different types of contracts are made covering a wide range of services by agents and others. The responsibility is placed on every licensee to maintain records which will disclose all essential facts regarding the transactions in his business.

7 C.F.R. § 46.15 Documents to be preserved

Bills of lading, diversion orders, paid freight and other bills, car manifests, express receipts, confirmations and memorandums of sales, letter and wire correspondence, inspection certificates, invoices on purchases, receiving records, sales tickets, copies of statements (bills) of sales to customers, accounts of sales, papers relating to loss and damage claims against carriers, records as to reconditioning, shrinkage and dumping, daily inventories by lots, a consolidated record of all rebates and allowances made or received in connection with shipments handled for the account of another, an itemized daily record of cash receipts, ledger records in which purchases and sales can be verified, and all other pertinent papers relating to the shipment, handling, delivery, and sale of each lot of produce shall be preserved for a period of 2 years.

7 C.F.R. § 46.18 Record of produce received.

Market receivers shall keep in the order of receipt a record of all produce received and this record shall be in the form of a book (preferably a bound book) with numbered pages or comparable business record. This record shall clearly show for each lot the date of arrival and unloading, whether received by freight, express, truck, or otherwise; the car initials and number; the truck license number and the driver's name or the name of the trucking firm; the number of packages or the quantity received; the kind of produce; the name and address of the consignor or seller, whether the produce was purchased; consigned or received on joint account; and the disposition of the produce, whether jobbed or sold in carlots or trucklots, and the lot number assigned to the shipment by the receiver (as required by 46.20).

7 C.F.R. § 46.19 Sales tickets

Sales tickets shall bear printed serial numbers running consecutively and shall be used in numerical order so far as practica-

ble. No serial number shall be repeated within a 90-day period. The sales tickets shall be prepared and all the details of the sale shall be entered on the tickets in a legible manner in order that an audit can be readily made. Erasures, strike-outs, changes, etc., should be held to the minimum. When errors are made in preparing sales tickets, the tickets should be voided. Each sales ticket shall show the date of sale, the purchaser's name (so far as practicable), the kind, quantity, the unit price, and the total selling price of the produce. Each sales ticket shall show the lot number of the shipment if the produce is being handled on consignment or on joint account. Sales tickets on all other lots of the same commodity which are on hand at the same time shall also show a lot number. The original or a legible carbon copy of each sales ticket, including those voided or unused, shall be accounted for and shall be filed or stored either by dates of sales or in the order of the serial numbers for a period of two years.

7 C.F.R. § 46.20 Lot numbers.

An identifying lot number shall be assigned to each shipment of produce to be sold on consignment or joint account or for the account of another person or firm. A lot number should be assigned to any purchased shipment in dispute between the parties to assist in proving damages. A lot number shall be assigned to each purchased shipment of similar produce on hand at the time or received later while the consigned or joint account or disputed lot is being sold. A lot number shall be assigned to each purchased shipment which is reconditioned if the seller is to be charged with the shrinkage or loss. The lot number shall be entered on the receiving record in connection with each shipment and entered on the sales tickets identifying and segregating the sales from the various shipments on hand. The lot number shall be entered on the sales tickets by the salesman at the time of sale or by the produce dispatcher, and not by bookkeepers or others after the sales have been made. No lot number shall be repeated within a period of 30 days after the last sale from the preceding lot to which such number was assigned.

7 C.F.R. § 46.22 Accounting for dumped produce.

A clear and complete record shall be maintained showing justification for dumping of produce received on joint account, on consignment, or handled for or on behalf of another person if any portion of such produce regardless of percentage cannot be sold due to poor condition or is lost through resorting or reconditioning. In addition to the foregoing, if five percent or more of a shipment is dumped, an official certificate, or other adequate evidence, shall be obtained to prove the produce was actually without commercial value, unless there is a specific agreement to the contrary between the parties. The original certificate or other adequate evidence justifying dumping shall be forwarded to the consignor or joint account partner with the accounting and a copy shall be retained by the receiver.

7 C.F.R. § 46.23 Evidence of dumping.

Reasonable cause for destroying any produce exists when the commodity has no commercial value or when it is dumped by order of a local health officer or other authorized official or when the shipper has specifically consented to such disposition. The term 'commercial value' means any value that a commodity may have for any purpose that can be ascertained by the exercise of due diligence without reasonable expense or loss of time. When produce is being handled for or on behalf of another person, proof as to the quantities of produce destroyed or dumped in excess of five percent of the shipment shall be provided by procuring an official certificate showing that the produce has no commercial value from any person authorized by the Department to inspect fruits and vegetables. Where such inspection service is not available certification may be obtained from (a) any health officer or food inspector of any State, county, parish, city or municipality or of the District of Columbia; (b) any established commercial agency or service making inspections for the fruit and vegetable industry; or (c) when no inspector or health officer designated above is available consideration will be given to other evidence such as inspection and certification made by any two persons having no financial interest in the produce involved or in the business of any person financially interested therein, and who are unrelated by blood or marriage to any such financially interested person, and who, at the time of the inspection and certification, and for a period of at least one year immediately prior thereto, have been engaged in the handling of the same general kind or class of produce with respect to which the inspections and certification are to be made. Any certificate issued by any persons designated in paragraph (c) of this section shall include a statement that each of them possesses the requisite qualifications. Any such certificate shall properly identify the produce by showing the commodity, lot number, brand or principal identifying marks on the containers, quantity dumped, name and address of applicant, condition of the produce, time, place, and date of inspection and a statement that the produce possesses no commercial value.

7 C.F.R. § 46.29 Duties

(a) General. All licensees who accept produce for sale on consignment or on joint account are required to exercise reasonable care and diligence in disposing of the produce promptly and in a fair and reasonable manner. A commission merchant engaged to sell consigned produce may not employ another person or firm, including auction companies, to dispose of all or part of such produce without the specific prior authority of the consignor. A commission merchant is not authorized to sell consigned produce outside the market area where he is located without obtaining the permission of the consignor. Average or flat rate of sales is not permissible unless the receiver obtains the specific written permission of the consignor prior to each individual sale. Complete and detailed records shall be prepared and maintained by all commission merchants and joint account parties covering produce received, sales, quantities, dates and cost of repacking or

reconditioning, unloading, handling freight, demurrage or auction charges, and any other expenses which are conducted on the accounting, in accordance with provisions of 46.18 through 46.23. When rendering account sales for produce handled for or on behalf of another, an accurate and itemized report of sales and expenses charged against the shipment shall be made. It is a violation of section 2 of the [PACA] to fail to render true and correct accountings in connection with consignments or produce handled on joint account. Charges which cannot be supported by proper evidence in the records of the commission merchant or joint account partner shall not be deducted. The commission merchant or joint account partner may be held liable for any financial loss and for other penalties provided by the [PACA], due to his negligence or failure to perform any specification or duty, express or implied, arising out of any transaction subject to the Act.

(b) Commission charges. Before accepting produce on consignment, the parties should reach a definite agreement on the amount of the commission and other charges which will be assessed by the commission merchant. In the absence of such an agreement, only the usual and customary commission and other charges shall be permitted. The receiver may not reconsign produce to another person or firm, including auction companies, and incur additional commissions, charges or expenses without the specific prior authority of the consignor. Unless otherwise agreed upon by the parties, joint account partners shall not charge a commission fee or other selling charges against the joint account for disposing of the produce. When a portion of a consigned shipment is purchased by the commission merchant he shall not charge or receive a commission fee for such sales.

Findings of Fact

1. Respondent is a New York corporation whose address is Hunts Point Terminal Market, Stores B205–B208, Bronx, New York 10474.

2. Pursuant to the licensing provisions of the PACA, license number 661683 was issued to respondent on January 3,1966. This license was renewed annually and is next subject to renewal on or before January 3, 1987.

3. Respondent primarily does business as a commission merchant, and also does business as a joint account partner. It conducts approximately 100 such transactions in an average month. Audits were made of 70 lots of perishable agricultural commodities received and accepted by Harry Klein on consignment or joint account during the period September 1982 through August 1984. Of those 70 audits, 63 reflected that respondent sent its principals false accountings in transactions involving produce shipped in interstate commerce.

4. In 57 of the 63 lots of produce, referred to in finding 3, *supra*, respondent acted as consignee for 22 shippers,and received, accepted and sold the produce, and collected the proceeds. However, in respect to each of the 57 lots, respondent failed to account truly and correctly

to its principals, and, in respect to 51 of the lots, respondent failed to make full payment promptly of the net proceeds to its principals.

5. Six of the 63 lots of produce, referred to in finding 3, *supra*, involved joint account transactions with two shippers under which Harry Klein had agreed to repay the shippers the cost of purchasing the produce, plus one-half of the net profits realized from the sales of each shipment. Though respondent received, accepted and sold the produce involved, and collected the proceeds therefrom, it failed to account truly and correctly and make full payment promptly to its principals as to each of these lots and, instead,underreported and underpaid them.

6. Respondent's employees prepared the accounts of sale sent its consignors and joint account partners from a "lot book," which significantly differed from the produce's actual sales prices which had been entered at the time of sale in a "pricing book."

Conclusion

The acts of Harry Klein in failing to account truly and correctly, and failing to make full payment promptly due the consignors named in finding 4, and to its joint account partners named in finding 5, constitute willful, flagrant, and repeated violations of the PACA (7 U.S.C. § 499b), and the revocation of Harry Klein's PACA license is the appropriate sanction.

Discussion

A. Introduction

The PACA was enacted to regulate and control the handling of fresh fruits and vegetables. 71 Cong. Rec. S2163 (May 29, 1929). Its passage was occasioned by the severe losses that shippers and growers were suffering due to unfair practices on the part of commission merchants, dealers, and brokers. H.R. Rep. 1041, 71st Cong., 2d Sess. (1930). Its primary purpose was to provide a practical remedy to small farmers and growers who were vulnerable to the sharp practices of financially irresponsible and unscrupulous brokers in perishable agricultural commodities. *Chidsey v. Guerin*, 443 F.2d 584 (6th Cir. 1971); *O'Day v. George Arakelian Farms, Inc.*, 536 F.2d 856 (9th Cir. 1976). "Accordingly, certain conduct by commission merchants, dealers, or brokers [was] declared to be unlawful. 7 U.S.C. § 499b." *Id.* at 858. Enforcement is effectuated through a system of licensing with penalties for violation. H. Rep. 1041, 71st Cong., 2d Sess. (1930) 3 *See also George Steinberg and Son, Inc., v. Butz*, 491 F.2d 988 (2d Cir.), cert den., 419 U.S. 830 (1974)

The instant proceeding is such an enforcement action in which there are two issues: (1) Did respondent violate the PACA; (2) If so, what is the appropriate sanction that should be imposed.

B. Respondent Violated the PACA

The PACA makes it unlawful, *inter alia*, for any commission r chant, dealer, or broker "to fail or refuse truly and correctly to acc and to make full payment promptly" of its obligations with regar transactions, in interstate commerce, involving perishable agricult commodities. (7 U.S.C. § 499b(4)). The Department defines ' payment promptly" as requiring payment of the net proceeds for duce received on consignment or the pro rata share of the net pr for produce received on joint account within 10 days after the day which the last sale was made. 7 C.F.R. § 46.2(aa)(1). By that s date, receivers must render their principals a true and correct acco ing. 7 C.F.R. § 46.2(z).

The complaint alleged that the respondent violated the PACA the Regulations by failing to account truly and correctly with respec 63 transactions, and by failing to make prompt payment of the proceeds or pro rata shares of the net profits with respect to 57 of th transactions involving a variety of perishable agricultural commodit for a total of $43,108.18.

The evidence presented at the hearing supported complainant's a gations. Mr. Thomas Leming, Regional Director of the PACA Nor east Regional Office, who was in charge of the investigation of resp dent, and Ms. Myrna Sterin, an investigator, testified as to the metho ology used in conducting the investigation which was expressly a proved in *Sol Salins*, 37 Agric. Dec. 1699 (1978).

Ms. Sterin testified that she went to respondent's business location order to investigate a complaint filed by a shipper questioning retur received on a lot of curly parsley consigned to respondent, which identified in the complaint as Transaction No. 48. She further testifi that she asked for the usual records which are reviewed by the Depar ment's investigators such as the receiving book and sales tickets, as w as any other papers relating to that particular lot. After auditing r spondent's records pertaining to that lot, Ms. Sterin testified she foun a discrepancy in respondent's accounting to the shipper. According her testimony, she then rechecked her figures and found that she ha not made an error. After this discovery, Ms. Sterin expanded the aud to include two competing lots of consigned parsley, and again she foun discrepancies in respondent's accounts of sales. Subsequent to her re port to Mr. Leming, Ms. Sterin was instructed to conduct a full audit respondent's records.

Ms. Sterin initially delayed the audit as a courtesy to respondent' counsel at that time (Arthur Slavin, Esq.), and she then went on vaca tion. Later, the audit was actually conducted by Mr. Leming. H described the procedure which was used:

> Basically first the receiving record is asked for to identify commodities, quantities, shippers and dates, and terms of purchase. Once we have reviewed that record then we selected lots to run the records, the sales records of. Once we have

made that selection we ask for the file, meaning the suppliers' invoice, transportation papers, brokers memos of sale, or any other documentation which is normally kept together for an individual shipment.

We ask for those papers. We review those papers to determine when the load was received, how much was there. If there is anything such as a federal inspection that we should take note of, what accounting was issued, and this sort of information.

At that point then we locate and review sales tickets beginning on the day the load showed as arrived. We run those sales tickets until the records in some manner show that the sales had been completed either by coming up to one or two consecutive days in which no sales are made out of the lot or some other indication such as the accounting has already been drawn and the check issued for the proceeds or something of this nature.

From that point then on the sales shown as credit sales in the firms' sales records then we do a spot check on the accounts receivables to verify whether in fact the prices that were appearing on sales tickets were the same as those being received from the receivers' customers.

Mr. Leming testified that he received access to Harry Klein's records from its office manager, Mr. Harry Contreras, who was instructed to provide those records by the corporation's namesake and president, Mr. Harry Klein. Subsequent to being given access to the records and beginning his investigation, Mr. Leming discovered that two sets of records were maintained by Harry Klein reflecting the prices at which produce it had accepted on consignment or on joint account, had sold. One of these was designated as the "pricing book". In that document, the actual prices for which the produce was sold were recorded The other book was designated as the "lot book". That book contained prices, which respondent's employees Curtis and Coby, admitted they created to improve the image of respondent's selling operations, which did not accurately depict the actual prices as recorded in the "pricing book". It was these fictitious prices which were reported to Harry Klein's principals in the accounts of sale respondent sent to them.

Mr. Leming testified that respondent engaged in about 100 joint account or consignment transactions in an average month. Because of the vast number of transactions involved, only 70 of the approximately 2,400 transactions engaged in by respondent during the two years preceding the investigation were actually reviewed. The 70 transactions were chosen on a random basis. Of the 70 accounts of sales reviewed by the Department, only two did not involve sales made in interstate commerce, two or three of the others were correct, and two or three were not reviewable because sales tickets could not be located The remaining 63 accounts of sales showed discrepancies; 57 transactions, when average sales prices were assigned, showed underpayments totaling $43,108.18 and 6 transactions showed overpayments totaling

$4,221.82. In other words, 95% of the accounts of sales prepared by respondent during the two years preceding the investigation, which were part of the random sample, were inaccurate, and 92% of those accounts of sales favored respondent by some $633 per transaction.

Though otherwise similar, two prior Departmental decisions on the sanctions to be imposed for erroneous accountings to consignors of produce are unlike the present case in that in neither case was there any evidence that the actual facts were intentionally misstated to principals. *Sol Salins*, 37 Agric. Dec. 1699 (1978), and *Kaplan's Fruit & Produce Company, Inc.*, 44 Agric. Dec. 333, (PACA Docket No. 2-6059, January 30, 1985). Whereas, in this case, Harry Klein maintained two sets of records, and the accounts of sales it sent to its principals were based not upon the one set which accurately detailed the disposition of the consigned produce, but upon the second set of records which respondent knew to be false.

Respondent's failures to truly and correctly account and make full and timely payment, as alleged in the complaint, are clearly in violation of the prohibitions of the PACA (7 U.S.C. § 499b). *Atlantic Produce*, 35 Agric. Dec. 1631 (1976), *aff'd mem.*, 568 F.2d 772 (4th Cir.), *cert. den.*, 439 U.S. 819 (1978). Moreover, the numerous violations committed by respondent constitute flagrant and repeated violations of the PACA. *American Fruit Purveyors v. United States*, 630 F.2d 370, 373-374 (5th Cir. 1980) (per curiam), *cert. denied*,, 450 U.S. 997 (1981); *G. Steinberg & Son, Inc.*, 32 Agric. Dec. 236 (1973), *aff'd sub. nom., George Steinberg and Son, Inc. v. Butz, supra*, 491 F.2d 988. Furthermore, these violations were willful. A violation is willful if, irrespective of evil motive or erroneous advice, a person intentionally does an act prohibited by a statute or if a person carelessly disregards the requirements of a statute. *Henry S. Shatkin*, 34 Agric. Dec. 296 (1975); *G. Steinberg & Son, supra*, 32 Agric. Dec. 236, 263-269; *Goodman v. Benson*, 286 F.2d 896 (7th Cir. 1961). Respondent's witnesses admitted at the hearing that, although they were aware that the PACA required respondent to render accurate accountings, the accountings sent to its principals were false and were based, not on the facts, but on their "experience" of what their principals would find acceptable. Thus, although respondent had never been warned by Departmental personnel that such practices were not permitted, its operators knew the PACA required it to provide accurate accountings to its principals. Nevertheless, its operators ignored this requirement and provided Harry Klein's principals with false accountings. Under these circumstances, respondent's violations must be found to be willful.

C. Sanction

As sanction for its violations, complainant has asked that respondent's PACA license be revoked. James R. Frazier has testified on complainant's behalf that this recommendation was predicated by: the

number of consignment and joint account transactions in which respondent engaged in an average year (1,200); the number of violations (63); the seriousness of the violations; the impact of the violations on the industry as a whole; the interests of the Secretary in ensuring that the trust relationship which exists between members of the industry — the basis for virtually every transaction in this multibillion dollar industry — is maintained; and the willfulness of the violations as shown by the pattern of the violations, i.e., in only two or three out of the 70 transactions reviewed did respondent provide its principal with an accurate accounting and, the fact that respondent maintained two sets of records, to facilitate its sending fictional accounts of sale to its principals based upon the false set of records, instead of the one that contained accurate information. Taking all these factors into consideration, the sanction sought by complainant should be granted. *J. H Norman & Sons Distributing Co., supra,* 37 Agric. Dec. 705; *G. Steinberg & Son, supra,* 32 Agric. Dec. 236.

Prior case precedent also supports the issuance of the sanction requested. It has long been held by the Department of Agriculture that breaches of a fiduciary relationship of the kind which existed between the respondent and its principals, is one of the most serious violations of the PACA because that type of relationship calls for a "high degree of care, honesty and loyalty to the consignors. . . ." *Mandell, Spector, Rudolph Co.*, 24 Agric. Dec. 651, 701 (1965), *aff'd.*, 364 F.2d 889 (3d Cir. 1966), *cert. den.*, 385 U.S. 1008 (1967). In that case, the accounts of sale sent to the consignors "appear to have been constructed *in spite of or in total disregard of* its records rather than on the basis thereof." *Id.* at 692. As a consequence, the Judicial Officer was inclined to revoke the PACA license but instead ordered a 90 day suspension because past sanctions, as of 1965, had not gone beyond a license suspension. That is no longer Departmental policy and the harsher sanction of revocation is imposed when found to be warranted.

In the *Salins* case, *supra,* even though the respondent's failures to accurately account to consignors were found to be the result of human error and unintentional, the Judicial Officer suspended the respondent's license completely for 21 days, and suspended its right to enter into consignment transactions, or serve as a fiduciary with respect to produce, for 90 days. In *Kaplan's Fruit & Produce Company, Inc., supra,* the PACA license was suspended for 30 days. There, the Judicial Oficer stated (slip opinion at 25), that 30 days was a sufficient suspension because "there [was] no indication that [Kaplan's Fruit] intentionally underpaid consignors or that [it] underpaid consignors a large amount." Moreover, the consignment sales represented a "trivial" part of its "tremendous" produce business. In the instant case, the respondent's operators have admitted that the accountings sent to principals were deliberately fabricated even though accurate sales records

were available. Moreover, the evidence reflects that it conducted over 100 consignment and/or joint account transactions in every month, and that such transactions were a substantial part of its total business. The most severe sanction of revocation is therefore warranted in this case.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

The record in this case is a disgrace to the administrative law process. Neither party bothered (or thought) to number each page of multi-page exhibits. (Complainant introduced 65 exhibits, many of which contain from 10 to 30 pages.) As a result, it was difficult for those at the hearing, and more difficult for those reviewing the cold record, to determine which page of a particular exhibit was being discussed. The confusion in one instance approaches that of Abbott and Costello's "Who's on first?" routine, *viz.* (Tr. 184-86):

Q. Transaction 55, Mr. Curtis, cantaloupes.

. . . .

Q. The accounting, the account sale reported to the shipper shows 39 18's at $12. Our auditor found 61 18's at $12. Your daily summary sheet, which is in there shows let's see — shows 90 at $12. Do you see that?

A. I see 61 at $12 I see.

Q. Look at the daily summary sheet in there. Do you see that?

A. This here you mean?

Q. No, that's the pricing in sheet, is that right? That's the comparative accounting sheet, this one over here.

A. This is yours and this is ours.

Q. Right. Here's another document with a date June 8, 1984 on top.[3] Now that, as I understand it, would be your pricing in book. Your term. What our investigators have called a lot book.

MR. McCARRON: Have called a what?

MR. SILVERSTEIN: Lot book.

Q. Now, another document right underneath that I believe is a daily summary sheet, is that right? This document right here? It's a document with loupes and underneath it Jack Tar (phonetic) and a lot number 502.

A. Yes, but this is not ours. I don't think that's ours.

Q. I believe that is.

A. This here?

Q. Yes, sir.

A. Where's — here's the scratch sheet right here I believe. No, this is the pricing in. But where's the scratch sheet. This isn't our scratch sheet.

[3] Three of the documents in the exhibit under discussion are dated June 8, 1984, at the top (CX 55, 2nd, 8th, and 11th pages), and two other documents have the date June 8, 1984, near the top (CX 55, 7th and 10th pages).

Q. That is what you call the green sheet isn't that what that's a copy of? We have called the daily summary sheet.

A. No, I don't know. I don't have access to this. I have it to the book you know where it's taken from and put in. Yes, that I do. This I don't even -- that's why it looks unfamiliar to me.

Adding to the confusion is the fact that, as might be expected, some pages in the exhibits are out of order. For example, in the official record, the 6th and 7th pages of complainant's exhibit 1 should be the 8th and 9th pages, and the 8th and 9th pages should be the 6th and 7th pages, respectively. These pages being out of order is particularly troubling to one reviewing the record since complainant's exhibit 1 was used to illustrate similar documents in other exhibits, including the vital *lot book* and *pricing book*, and the questioning as to these vital documents identifies them by their location, i.e., the "next 2 sheets" after the "first 4 sheets" following the "cover sheet" (Tr. 46-47).

Also, as might be expected, there are at least some duplications (perhaps with some omissions in other copies). For example, in complainant's exhibit 2, the 5th page is identical to the 7th page.

Six days before the hearing in this case, I recommended that the ALJ's require that each page of multi-page exhibits be separately numbered.[4] That recommendation was not made in time to be followed here. I again renew my recommendation in this respect.

Once the shortcomings of the record are overcome, it is easy to see that the undisputed evidence supports the ALJ's findings, conclusions and sanction.

Before quoting the admissions by respondent's employees that prove respondent's guilt, it is necessary to set forth a brief description of respondent's procedures and bookkeeping system, omitting those records and procedures not necessary for an understanding of the condemnatory admissions.

Each shipment of produce received by respondent is recorded in a *receiving book* (also called *lot book*), recording the name of the shipper, the amount and type of produce, and the lot number assigned by respondent to identify the lot (e.g., RX 4). When sales are made, the salesman prepares a *white ticket* showing the purchaser, the amount and type of produce, and the sales price (e.g., top of RX 6). The *white ticket* is recorded by respondent's cashier on a *green sheet*, which

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[4] *In re H & J Brokerage, Inc.*, 45 Agric. Dec. 1154, slip op. at 72 n.15 (May 22, 1986). In *In re Aldovin Dairy, Inc.*, 42 Agric. Dec. 1791, slip op. at 2 (Nov. 15, 1983), *aff'd*, No. 84-0088 (M.D. Pa. Nov. 20, 1984), the Judicial Officer explains that before deciding the case, he had to remand the case (in July 1983) to the ALJ "for the purpose of ensuring that the official Department file contains an accurate set of [the milk handler's] exhibits. . . ." The remand order (which, erroneously, failed to get published in July 1983) criticizes the fact that the individual pages of multi-page exhibits are not "consecutively numbered."

shows for each lot the total number of units sold at each price (e.g., RX 9). Respondent's office manager then enters the sales into respondent's *pricing book* (e.g., RX 10).[5] (Tr. 35-37, 47, 210-33, 282-84). A copy of the page from respondent's *pricing book* relating to Transaction 1 is reproduced on the next page (CX 1, 9th page in official file, but 7th page as described in testimony).

Page from Respondent's "pricing Book" for Transaction 1 (Cx 1)

(See page 149-A)

Only the bottom portion of the preceding *pricing sheet*, which relates to respondent's Lot No. 574 (JO Ref. 8, p. 24),[6] and is alleged in the complaint as Transaction No. 1 (Complaint at 4), is relevant to this proceeding. Transaction 1 involves 480 flats (or trays) of strawberries, 12 cups to the flat (JO Ref. 2, p. 24), received by respondent from Well-Pict, Inc. (JO Ref. 1(a), p. 24). The *pricing sheet* shows sales of 4 trays at $1.25 per cup [7] (JO Ref. 3, p. 24), 211 trays at $1 per cup (JO Ref. 4, p 24) (155 + 3 + 51 + 2 = 211), 164 trays at $ 90 per cup (JO Ref. 5, p. 24) (150 + 8 + 6 = 164), 31 trays at $.85 per cup (JO Ref. 6, p. 24), and 72 trays at $.75 per cup (JO Ref. 7, p. 24). The *pricing sheet* shows that the papers relating to respondent's Lot No. 574 are filed in respondent's Folder No. 607 (JO Ref. 9, p. 24).

Although complainant's investigators found errors in the *pricing book's* figures as to various transactions, there is no contention by complainant (and no reason to believe) that the figures in the *pricing book* are intentionally false. In fact, respondent's actual sales at each price of each commodity as determined by complainant's investigators "compare very favorably to the account sales that would have come off the pricing book" (Tr. 59; and see Tr. 51-59).

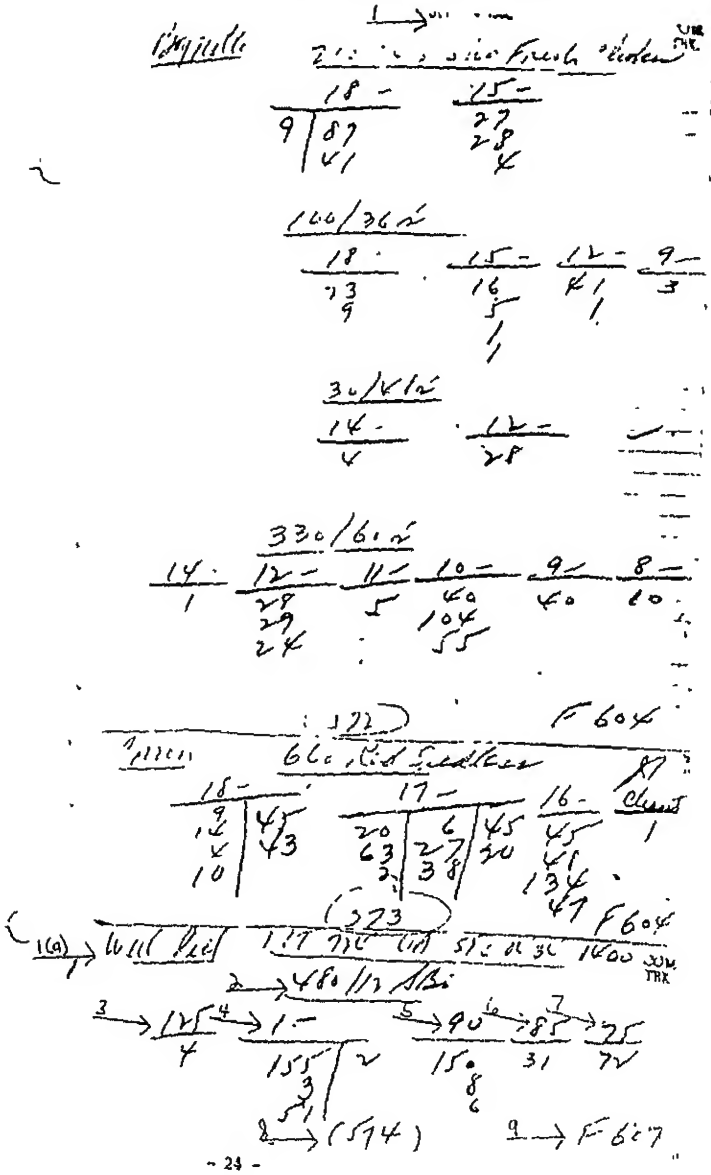
Notwithstanding respondent's creation of a *pricing book* designed to accurately record the actual sales prices of each lot of produce, respondent did not use the prices in that book to make out the accountings it

[5] All of the witnesses for complainant and respondent referred to this document as the *pricing book* except one. Respondent's witness, Mr. Curtis, referred to this document as the *scratch book*. The book that all the other witnesses referred to as the *receiving book* or *lot book* was referred to by Mr. Curtis as the *pricing book* or *finalization book*. (Tr 149-50, 161-65, 175-76, 178-79).

[6] Judicial Officer references to specific parts of exhibits consist of numbered arrows, which are numbered consecutively as they would be seen if a ruler were pulled down the page. Some data identified by numbered arrows are not discussed until later in the decision, but numbering them in sequence facilitates locating them.

[7] Thomas Leming, Regional Director of the Northeast Regional Office, PACA Branch, who participated in and supervised the investigation involved here, testified that in Transaction 1 "the individual cups were sold on a per cup basis and there were 12 cups to the flat [or tray]" (Tr. 73). Accordingly, the total sales price of 4 trays at $1.25 per cup is $72 (4 x $1.25 x 12 = $72.00).

Page from Respondent's "Pricing Book" for Transaction 1 (CX 1) (119-A)



gave to its principals. Instead, respondent's employees created a fairy tale, i.e., a fictitious account of the sales prices designed to be pleasing to the eyes of respondent's principals. This fairy tale was recorded in respondent's *receiving book* (also called *lot book*),[8] and the accountings to respondent's joint account partners and principals in consignment transactions were based on those fairy-tale prices (Tr. 37-38, 44, 149-50, 161-69, 178-80, 215, 232-33, 282-94). Mr. Leming, complainant's principal investigator, testified (Tr. 44):

> Q. The lot book was — the information in the lot book was precisely the same information as was on the Respondent's accounting to its principals?
>
> A. Yes, as far as sales figures go.

The fairy-tale prices entered into respondent's *receiving book* (or *lot book*) for Transaction 1 are reproduced on the next page (CX 1, 8th page in original file, but 6th page as described in the testimony). The accounting sent to respondent's principal (Well-Pict, Inc.) in Transaction 1 is reproduced on the following page (CX 1, 2nd page).

Page from Respondent's "Receiving Book" (Or "Lot Book") for Transaction 1 (Cx 1)

Respondent's Accounting to Principal In Transaction 1 (Cx 1)

(See pages 150-A and 150-B)

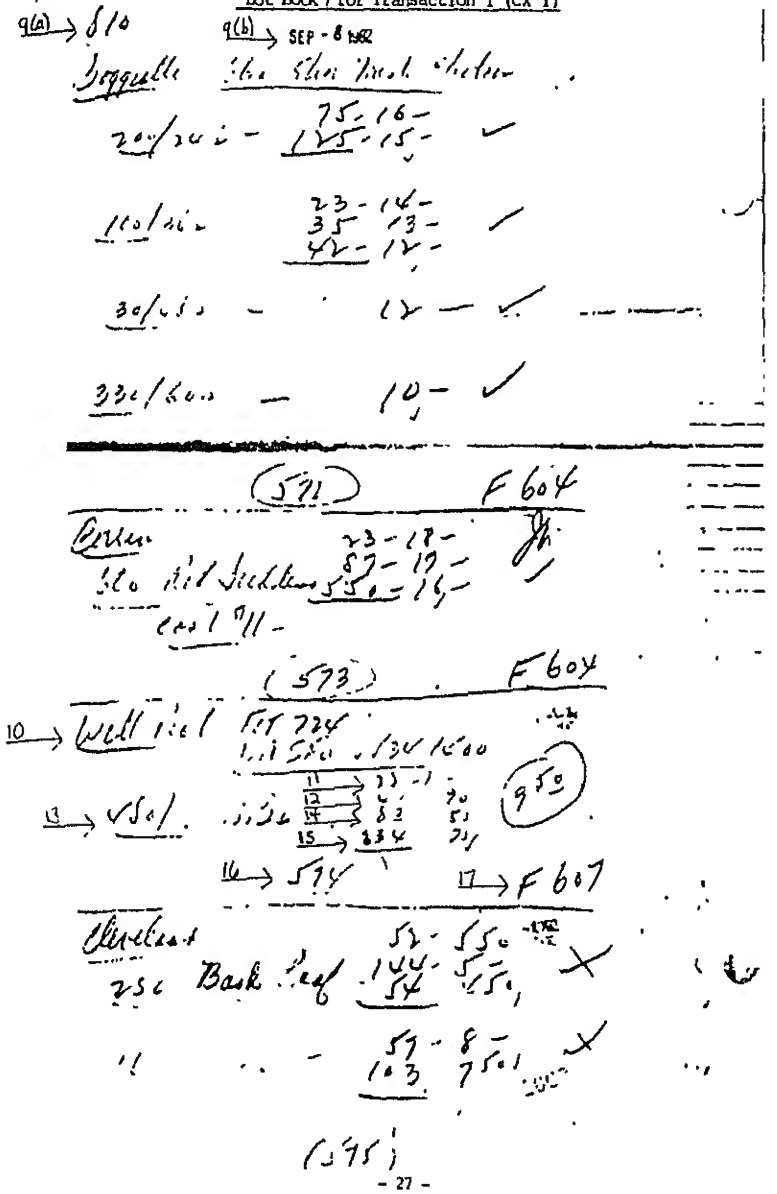
Respondent's *receiving book* (or *lot book*) for Transaction 1, i.e., respondent's Lot No. 574 (JO Ref. 16, p. 27), shows that the papers are filed in respondent's Folder No. 607 (JO Ref. 17, p. 27), the shipper is Well-Pict, Inc. (JO Ref. 10, p. 27), and the lot involves 480 flats of strawberries, 12 cups to the flat (JO Ref. 13, p. 27). The *receiving book* (or *lot book*) further shows sales of 22 trays at $1 per cup (JO Ref. 11, p. 27), 41 trays at $.90 per cup (JO Ref. 12, p. 27), 83 trays at $.85 per cup (JO Ref. 14, p. 27), and 334 trays at $.75 per cup (JO Ref. 15, p. 27).

The next page reproduced above (respondent's accounting to its consignor, Well-Pict, Inc. (JO Ref. 18, p. 28)), shows prices identical to the prices recorded in respondent's *receiving book* (or *lot book*). Specifically, the accounting shows sales of 22 trays at $1 per cup (JO Ref. 20, 21, p. 28), for a total of $264 (JO Ref. 22, p. 28; 22 x $1 x 12 = $264), 41 trays at $.90 per cup (JO Ref. 23, 24, p. 28), for a total of $442.80 (JO Ref. 25, p. 28; 41 x $.90 x 12 = $442.80), 83 trays at $.85 per cup (JO Ref. 26, 27, p. 28), for a total of $846.60 (JO Ref. 28, p. 28; 83 x $.85 x 12 = $846.60), and 334 trays at $.75 per cup (JO Ref. 29, 30, p. 28), for a total of $3,006 (JO Ref. 31, p. 28; 334 x $.75 x 12 = $3,006). The total sales amounted to $4,559.40 (JO Ref. 32, p. 28). After deducting expenses totaling $2,184.17 (JO Ref. 34,

[8] See note 5, *supra*.

(150-A)

Page from Respondent's "Receiving Book" (or "Lot Book") for Transaction 1 (CX 1)



(150-B) Respondent's Accounting to Principal in Transaction 1 (CX 1)

TELEPHONE 212 991 5160

L. D. 991-5818

CABLE ADDRESS KLEINHOUSE, New York

Harry Klein Produce Corp.

COMMISSION MERCHANTS
CARLOT • RECEIVERS

FRUITS AND PRODUCE

N. Y. C. TERMINAL MARKET • ROW B205 TO 209 • HUNTS POINT & EAST BAY AVES.,
BRONX, NEW YORK 10474 SEPT. 15, 19 82

Sold for Account of— WELL-PICT,INC. 18

#9994

LDER 607 19 DATE 8/8/82 REL. PAGE CAR NO. UASP0-0434-1400

QUANTITY	COMMODITY	PRICE	AMOUNT
22	20 STRAWBERRIES 12	21 1 00	22 264 00
41	23	24 90	25 442 80
83	26	27 85	28 846 60
334	29	30 75	31 3006 00
480			32 4559 40

SUMMARY OF SETTLEMENT

CHARGES	AMOUNT
FREIGHT	1441 44
CARTAGE	168 00
INSPECTION	
ICE	
SERV. CHARGE	24 00
TERM CHARGE	3 60
COMMISSION	33 547 13
	34 2184 17
NET PROCEEDS	[redacted] 35 2375 23

p. 28), including respondent's 12% commission, $547.13 (JO Ref. 33, p. 28; $4,559.40 x .12 = $547.13), respondent remitted net proceeds of $2,375.23 (JO Ref. 35, p. 28) to its principal.

Respondent's employees who conjured up the fairy-tale prices recorded in the *receiving book* (or *lot book*), i.e., the prices used in preparing respondent's accountings to its principals, readily admitted that the prices were fictional. Three employees created the fairy-tale prices, Harry Klein, respondent's president (who, together with his wife owned 75% of respondent's stock), Samuel Coby, respondent's vice president and secretary-treasurer (who owned the remaining 25% of respondent's stock), and William H. Curtis, respondent's sales manager (Tr. 37-38, 139, 149-50, 164-66, 232, 284-91; CX 64).

Before Harry Klein's death, 2 months before the hearing, Mr. Klein was in charge of respondent's general management. Mr. Coby carried out Mr. Klein's directions until his death, at which time Mr. Coby took charge of respondent's general management. Mr. Coby has been employed by respondent for 39 years. (Tr. 242-44)

Mr. Coby candidly admitted that for 30 or 40 years respondent's employees followed the practice of making up prices to be recorded in the *receiving book* (or *lot book*) to be used in accounting to respondent's principals. He admitted that part of their methodology was to just guess at what prices to put down, without necessarily looking at anything objective (such as the *pricing book*), based on their impression of the general condition of the merchandise, what future returns or allowances might occur, and what prices would be pleasing to respondent's principals and make respondent look like a good seller. He testified (Tr. 282-94):

> Q. Mr. Coby, I've handed you two documents which I've pulled from Complainant's Exhibit 1, related to transaction 1 of the complaint. One of the documents [from the *receiving book* or *lot book*] has a date up on top, September 8, 1982 [JO Ref. 9(b), p. 27]. The other one [from the *pricing book*] has a September 82 date on it also but it's cut off at the top [JO Ref. 1, p. 24]. Do you see that?
>
> A. September 8. Oh, I'm sorry. Yes, I see the top of that.
>
> Q. The one on which the date is clear, September 8, 1982 [from the *receiving book* or *lot book*] also has in the left hand side of the date the number 810 [JO Ref. 9a, p. 27]. That's so we can identify the two different sheets.
>
> Now we're talking about in transaction 1 we're talking about lot number 574.
>
> A. Right.
>
> Q. Lot 574 appears to be file 607 [JO Ref. 17, p. 27]. Do you see that on the sheet [from the *receiving book* or *lot book*] with the September 8, 1982 date clearly on top [JO Ref. 9(b), p. 27]?
>
> A. Yes, I see—wait a moment. What did you say number—

Q. 574, it looks like it's file 607.

A. Right.

Q. This document that we're looking at [from the *receiving book* or *lot book*] which says September 8, 1982 [JO Ref. 9(b), p. 27] on it what record of Harry Kleins is that taken from? What do you call it?

A. I would say that would be the receiving book.

Q. The receiving book. Would that also be called the lot book?

A. Yeah, the lots are entered, right. In other words to have a clear precise record.

Q. Looking at the other document [from the *pricing book*] with the 574 down at the bottom [JO Ref. 8, p. 24] where is that taken from?

A. That would be what we would call the pricing book. No, I'm sorry. Yes, that would be the pricing book. In other words where sales were entered daily because they cover a period of perhaps, as I said from 3 to 7 days.

Q. If I look at the account sale which Harry Klein submitted to the consignor it matches up with the total figures in the lot book, the first document we looked at.

A. Right.

Q. However, if we look at the figures --

A. Excuse me. It doesn't quite match up. The amounts are not the same.

Q. If you look at the first document [*receiving book* (*lot book*)] that we looked at it shows 22 at $1 [JO Ref. 11, p. 27], 41 at .90 [JO Ref. 12, p. 27], 83 at .85 [JO Ref. 14, p. 27] and 374 [334] at .75 [JO Ref. 15, p. 27], which is precisely the amount which you reported to the consignor.

A. Right.

Q. But if you look at the second document [*pricing book*] the one where 574 is down at the bottom it reflects 4 sales at $1.25 [JO Ref. 3, p. 24], 211 sales at $1 [JO Ref. 4, p, 24; 155 + 3 + 51 + 2 = 211)], 164 sales at 90 cents [JO Ref. 5, p. 24; 150 + 8 + 6 = 164)], 31 at 85 [JO Ref. 6, p. 24] and 72 at 75 [JO Ref. 7, p. 24].

A. Right.

Q. Can you explain to me why those figures are different than the figures that were reported to the consignor?

A. Well, because as I say we have to make our returns within a period of 10 days or make an approximate average. Possibly in that period perhaps some of the sales that took place here were either returned or were not -- were lost in the repacking or returned items.

Q. Where do the figures in the pricing book come from?

A. From the sales done daily. In other words covering the period that it took to sell that particular lot of strawberries.

Q. Where do the figures in the lot book come from?

A. It's either myself or Mr. Klein if he was present priced them up in order to satisfy the shippers demand for an average price or a net price.

Q. Where did you get the figures from?

A. Well, we established what would be the possible average with the fact that we lost or we would have to repack some or get returns on some, which is reflected in your transaction 1 where 87 were unaccounted for. Although they're listed as an average sale price item [in complainant's Audit Account Sales, CX 1, cover page]

Q. But you accounted to the shipper for all of them.

A. Right. In other words to preserve our integrity with the shipper.

Q. Do you mean you preserve your integrity with the shipper by sending the shipper a false accounting?

A. An averaging accounting. It was what you might consider our methodology in order to maintain our relationship with the shipper.

Q. How can you tell from looking at your records what happened to the 4 trays at strawberries that you sold for $1.25 [JO Ref. 3, p. 24]?

A. I can't tell. It goes back to a period of '82.

Q. How could you tell what happened to those 4 trays that you sold for $1.25 when you prepared the figures in the lot book?

A. As I say either myself or Mr. Klein had used this method of averaging up the sales in the hopes that more returns would not be made or loss repacking would take place.

Q. Could you describe to me how you came up with the figures that you entered for lot 574 in the lot book?

A. As I said, it was our methodology of pricing up, averaging up as best we could, taking into account --

Q. That's what I want you to do is to describe the method that you used. Are you telling me that you just guessed?

A. I would say that would be part of the process or our methodology which we pursued for 30, 40 years.

Q. Did you look at anything objective when you did it or did you just say --

A. No, -- I'm sorry.

Q. Did you look at the pricing book at all?

A. Not necessarily. Probably we took into account the condition of the merchandise that we had at the time.

. . . .

Q. . . . [S]uppose you had a load of strawberries and I'll just arbitrarily take say 100 trays of strawberries just because it's an easy number for me to deal with. You've got 100 trays of strawberries. 5 trays arrive in really bad condition and the temperature on the 3 pan shows that it was 45 or 46 degrees. That's kind of high for strawberries isn't it?

A. Well, not that high but it is quite high. Strawberries should be in the 34 to 36 degree temperature.

Q. So they arrived those 5 trays arrived badly

A. Well, in our judgment then we would find that not only would the -- other than the 5 trays but having the rest of the 100 also being subjected to the same temperatures we would undoubtedly get repercussions from the customers by the time they received the merchandise in their stores which might be within the next 12 to 24 hours and by the time they put them up for retail sale. They would undoubtedly have repercussions because the heat being in the strawberries and it being as delicate a commodity as it is would naturally turn them moldy.

Q. But how would you deal with it? What I'm trying to get at is how you would deal with that particular situation on an account sale for that lot of strawberries?

A. Well, as I say, we would make what sales we could on the other 95 and list 5 or try and sell the 5 for less price if possible. If not then have to dump them.

JUDGE PALMER: But in your account to the shipper do you tell him you dumped 5 or you just make up the price of the 5?

THE WITNESS: No, that was our methodology in making our returns to the shipper. In other words that we did not at any time report dumped merchandise.

JUDGE PALMER: Why not?

THE WITNESS: Only because it took so long and for our own integrity and for the time it took us to sell where we should have sold them within say a 3, 4 day period it sometimes takes a little longer and where they become affected by weather particularly in the July, August, June period when berries can be highly perishable. As a matter of fact there are times when by the time they leave the market and arrive at a retail store they will show indication of break down.

JUDGE PALMER: Mr. Silverstein.

Q. Isn't it true that you did show produce dumped upon occasion?

A. On occasion, yes.

Q. Why did you do it occasionally but not all the time?

A. Well, occasionally when we had the foresight or shall I say when we took the trouble to have a government inspection. Most of the times we didn't. Like I say there were sometimes when merchandise was carried for a longer period than it should have been and it was totally unsalable.

We just dumped them and returned to the shipper for the total amount.

JUDGE PALMER: I didn't understand what you meant. You returned to the shipper for the total amount. What did you do to the shipper? You sent money to the shipper?

THE WITNESS: Yes.

JUDGE PALMER: Even though --

THE WITNESS: Yes. Well, not -- that some of them unsalable after a certain amount of time.

JUDGE PALMER: -- out of your pocket? Out of the company's pocket?

THE WITNESS: Exactly.

JUDGE PALMER: For what? To maintain your relationship with the shipper?

THE WITNESS: Yes.

Q. Mr. Coby, look at transaction number 4. You reported to that shipper that you dumped 193. How come you did it there and you didn't do it all the time?

A. We also -- we had some as low as 10 cents and then there again there are 940 that are average sales price [on complainant's Audit Account Sales, CX 4, cover page] which there is no record of. You don't tell a shipper that you dumped 1,100 packages out of 2,184.

Q. If they were bad why didn't you tell him?

A. As I said, this is a procedure that Mr. Klein originated when he started in business and it's one that I took up after him.

Q. But if you dumped 1,100 how come the report of investigation in that particular transactions, it's about the 4th page -- 5th page down from the top, reflects only 193 flats were looked at [by the inspector].

A. Well, as I said, going back to '82 there is a good chance that we dumped 193 immediately and then consequently probably we got merchandise back because of perhaps the time we took to sell it. In that particular period which is August, which are the dog days, we probably got returns. Just after having made the accounting we just had to dump them.

Q. The fact of the matter is is that you don't really know, isn't it true?

A. As I say, you're going back approximately what is it 6 years, 4 years I'm sorry. No, 2 years.

. . . .

Q. So as I understand your testimony then with regard to transaction 1 the figures which appear in the lot book and which were reported to the consignor as to the receipts for that particular shipment were probably made up by you without looking at anything terribly objective like sales tickets, is that right?

A. Possibly or possibly at that time we did get calls that they had poor merchandise and didn't know whether they would have to adjust them or return them to us.

. . . .

Q. Let's look at transaction number 2, Mr. Coby. There if you look at the fourth sheet it reflects that from the Department's investigation you apparently under reported over $3,500 of receipts. If you look through those documents before you.

. . . .

Q. If you look through those documents before you you'll find the account sale which was prepared by your company and sent to Well-Pick.

A. The second page?

Q. It's in there someplace. Yes. There are several copies of it in there in different forms. Somewhere further down are copies of what I think Ms. Menzies referred to as the green sheets which we have earlier referred to as the daily summaries. Do you see those?

A. Yes.

Q. We'll look at the daily summary sheets for these transactions. You'll notice that there are a whole series of transactions at 90 cents and $1.00 for these strawberries. Yet if we look at your accounting we see that none of them appear. Why would that be?

A. You also don't see 30 at a quarter.

Q. That's true and I was going to get to that, but will you answer my question first?

A. Yes, again, it was the net sales that we received or the net amount of money that we received for the total sales in that lot. Since there again there is 445 at ASP [Average Sales Price determined by complainant] 82 cent average. Those are probably berries that were dumped or returned by customers and dumped. Again, you're going back to July of '84.

Q. But how would you show in your records that they were dumped?

A. We didn't. As I said, our system was quite loose at the time. We did not bother to take government inspections. We just dumped the merchandise.

Q. But how can we assure the shipper that those strawberries were dumped and not sold?

A. I guess you can't unless you were present at the particular time.

Respondent explains that the problem with accurately accounting to principals is that respondent must remit to consignors within 10 days after respondent's final sale, but returns or allowances might occur later (Tr. 69-70, 264-65, 271, 273, 284-85). After respondent has paid its consignors, it is too late, as a practical matter, to ask them to repay the amount for the subsequent returns or allowances (Tr. 271). Mr. Coby testified that respondent could not increase its commissions to take into account anticipated returns or allowances (while accounting accurately to its consignors) because respondent would lose its consignors. Mr. Coby testified (Tr. 273):

JUDGE PALMER: On the one's now where you're taking a percentage [i.e., consignment transactions, Transactions 1-57] doesn't your percentage include returns and so forth? Isn't that calculated in?

THE WITNESS: No, it can't. No, because this must be made within the 10 day period.

JUDGE PALMER: Couldn't you figure that out in making your arrangement with the shipper? Say, look, I know there is going to be returns. Normally I charge you 12 per cent. I find that I have returns. I'm going to have to charge you 15 per cent. 3 per cent extra for returns.

THE WITNESS: I would probably lose my shippers.

JUDGE PALMER: You'll probably lose them if you explain it to them that way?

THE WITNESS: Right, or even attempted to charge them high commission.

Mr. Coby admitted that he knows that respondent is required to account accurately to its principals, and to have records and inspections as to dumped merchandise. He testified that since complainant's audit, "we have more or less cleaned up our act" (Tr. 318). He testified (Tr. 269-70, 318-20):

Q. After the audit was done did you make any changes with the way in which you -- procedures with regard to repacking, resorting, and dumping of produce?

A. Yes, I instructed all my people that from that point on that any merchandise that was lost through repacking should be notated. Any dumped merchandise that has to be dumped where previously we just did it on our own hook so to speak, that from that point on we would get government certificates for anything that's dumped or unsalable or to be dumped. Also make a record on the ticket of merchandise that was lost or the amount of merchandise that was lost in repacking in order to make a package salable.

. . . .

THE WITNESS: Since we've had the audit done, sir, we have more or less cleaned up our act. Every sale is notated per box by sale. The lot numbers are applied properly.

JUDGE PALMER: To the box now?

THE WITNESS: To the box.

JUDGE PALMER: -- to the box that's the only way you can tell what you're selling, right?

THE WITNESS: Any dump notations that are necessary that have to -- which we would love to avoid where possible, they are taken. We get government inspections and it's applied to the returns as they are made.

. . . .

JUDGE PALMER: All right. But you also understand, too, that the grouping of prices is something that is prohibited here and that you have to give them the exact --

THE WITNESS: Exact -- yes.

JUDGE PALMER: If you sold something for $12 you give them the $12. If you sold it for $1 you return them the $1. You understand that?

THE WITNESS: Definitely. Without fail and if the shipper understands it's fine, and if he doesn't feel that we are doing it the way he would like this is the way we're doing it from the 1984 on. Without a warning we've more or less done what we're supposed to be doing.

Mr. Curtis, respondent's sales manager, was more guarded in hi admissions than Mr. Coby. But, nonetheless, he admitted that, o occasions, he priced produce for the purpose of accounting to princi pals at what he regarded as a fair price, irrespective of the actual sale prices, and that he grouped sales together where there was a wide rang to make respondent's principals happier. He, too, admitted that h knows that the Act and regulations require an exact accounting. H testified (Tr. 165, 168–69, 178–80):

Q. What do you do when you determine that it's cleaned up?

A. Than I go over the sales with Kay [Menzies, respondent's office manager since November 1984 (Tr. 207, 235)]. She enters it in the pricing book [referred to as *lot book* by all other witnesses (note 5, *supra*)].

Q. Now tell us what you do there? When you got the sales and you enter it in the pricing book [referred to as *lot book* by all other witnesses], when she enters it into the final book, whatever you call it.

A. So we'll say it has 580 whatever it might be. I'll tell her so many at 12, so many at 11, you know I add the columns up and she puts it right into the pricing book [referred to as *lot book* by all other witnesses].

Q. Do you ever make adjustments on those columns?

A. I have at times.

Q. Tell us for what reasons and why are those adjustments made?

A. Well, sometimes maybe it will be open 2, 3 days and I know that the commodity is cleaned up. I sell it. I have a feel -- I'll notice that something is wrong is there that it hasn't -- so I'll more or less -- and these shippers they want to get paid fast. They're even after me send a check, how about some money, send a check we have to pay these growers. So in order to expedite it I price it in what I think is a fair price.

. . . .

Q. To the best of your knowledge. In other words, you tell her what to do on the accounts receivable right? I mean the accounts payable, the account sales, is that right?

A. Yeah.

. . . .

Q. Do you ever group sales together when there is a wide variety, when there is a wide discrepancy --

A. A range?

Q. A wide range, yes.

A. I've done that, yes.

Q. Why do you do that?

. . . .

A. In other words a range you're talking about.

Q. Yes, tell us what the range is --

A. Well, sometimes you may have a range of merchandise from 12 to 5.

Q. $12 to $5?

A. $5. Now, if that was sent back to a shipper he would go through the telephone there. I mean he'd see $5 to $12. He'd say what kind of salesmanship is that. So sometimes what I do is I bring up the $5.00 sales and bring the top ones down. In other words, there is a little bit of averaging there, which is on a rare occasions, but it does look better. There is nothing lost in dollars or cents.

. . . .

Q. Mr. Curtis, look at transaction 10. It involves lettuce. You handle lettuce don't you?

A. Yes, I do.

Q. Now I handed you two sheets from that file. We're looking at lot number 963.

A. Yes.

Q. There's one page with the 963 at the bottom [referred to by all other witnesses as the *lot book*] and one page with the 963 at the top [referred to by all other witnesses as the *pricing book*].

A. Yeah.

Q. Which is what you have called the pricing in book and which is what you call the scratch sheet?

A. The scratch sheet is 963 on the top [referred to by all others as the *pricing book*]. The pricing in book is 963 on the bottom [referred to by all others as the *lot book*].

Q. In the 963 at the top [referred to by all others as the *pricing book*] you have a range of --

A. 1 to 8.

Q. It look to me like there are some at $10 doesn't there?

A. 5 to 10, right.

Q. No, 7 to 10.

A. Right.

Q. So 12 to 10.

A. 12 to 10, correct, to a dollar [i.e., the book referred to by all others as the *pricing book* shows 5 sales at $10 on the left-hand side and 7 more sales at $10 on the right-hand side, for a total of 12 sales at $10, and shows other sales at $1, $2, $3, $4, $5, $6, $7, $8, and $9 (CX 10, next to last page)].

Q. Now why don't those 12 [sales at $10] appear in the pricing book [referred to by all others as the *lot book*]? What you've called the pricing book.

A. May I say something?

Q. Just answer my question.

A. I'll answer your question.

Q. Fine.

A. 963 on the bottom [referred to by all others as the *lot book*] if you notice is a range from 4 [dollars] to 8 [dollars] where it was priced in. From 4 to 8. I think the man would be happier looking at prices from 4 [dollars] to 8 [dollars] than he would from 1 [dollar] to a few of 10 [dollars]. They would say what happened here. I doubt very much if there was any money lost there. Dollars and cents I believe there was nothing lost. In fact it might be an overpayment.

Q. . . . You've been involved in the perishable agricultural commodities business for 36 years?

A. Yes.

Q. You are familiar with the Perishable Agricultural Commodities Act?

A. Somewhat. I won't say I know everything, but --

Q. Do you know what you're required to do or not required to do to comply with the Act?

MR. McCARRON: Objection. That's over broad to a lay person.

JUDGE PALMER: Why don't you ask him the question does he realize he is supposed to render correct accounts, give the exact -- I presume that's where you're going, the exact prices received in a consignment arrangement? Is that where you're going?

MR. SILVERSTEIN: Yes, eventually. Are you aware of that?

A. I'm aware of it, your Honor.

JUDGE PALMER: But you don't do that. Instead you use a range instead to make it more attractive to the consignment.

THE WITNESS: Not always, your Honor, on occasion.

During the course of complainant's investigation, respondent's employees never intended for the investigators to learn of the existence of the (more or less) accurate *pricing book*. Rather, they showed the investigators the *receiving book* (or *lot book*) containing the fairy-tale prices. The *pricing book* was discovered by complainant's principal investigator, Mr. Leming, accidentally, and it was immediately taken from him by respondent's office manager. It was not until about a week later, while respondent's office manager was on vacation (Tr. 82-84), that Mr. Leming looked for, and found, the *pricing book*. Mr. Leming testified (Tr. 38-40):

Q. Originally when you went in and requested information from Mr. Contreras [then office manager] were you told of the existence of both the pricing book and a lot book?

A. No, I wasn't.

Q. You were referred to which one of them?

A. I was referred to the lot book.

Q. How did you find out that there was a pricing book?

A. Well, how I found out was that one time I went to Harry Contreras' desk to pick up the lot book, which at that time he was also working out of because it was the current one, and I picked up the pricing book by mistake and took it to my desk and started to look through it. Mr. Contreras came over and said this isn't the book you're looking for, this is the book you're wanting to look at and handed me the lot book.

Q. At that time did you understand the difference between the two books?

A.No, I didn't.

Q.At what point in time did you understand the significance between them?

A.Well it -- the realization sort of sank in over time. It was probably about a week later that I began wondering what was in this other book. I didn't know what to call it. I didn't know that it was called pricing book at that time. So I began to look around. I located a -- in the storeroom where the sales tickets were stored I noticed a bundle together and it was noted pricing book. At that point I asked for the pricing book as well as the lot book to cover the lots that I had run.

Q.Were you given free access to this particular room?

A.While I was dealing with Mr. Contreras, yes.

Q.Did you continue to get free access to the information in that room?

A.Well, my access became slightly limited. On the day when I located the pricing book I received a phone call from Mr. Slavin [respondent's attorney] requesting that I ask for specifically any records I wanted to look at rather than looking at any records that were around.

Q.At that point in time did you start requesting the pricing book?

A.At that time, yes, I did.

Q.It was given to you without any problem?

ɔndent's employees establish that during the
ɹ this proceeding, September 1982 through
ɛngaged in flagrant and repeated violations of
l Commodities Act, 1930, and the applicable
ɹ s violations were an outrageous violation of
d by respondent to its principals and joint ac-

hat the figures it reported to its principals were
ıng of sales" permitted by 7 C.F.R. § 46.29(a).
or pooling of sales is permitted only with the
ɜsion of the consignors [obtained] prior to ren-
(7 C.F.R. § 46.29(a)). There is nothing in the

record to show that respondent had advance, specific written permission of the consignors to average or pool prices. Respondent had the burden of showing that it came within the exception to the prohibition in the regulations against averaging or pooling of sales (7 C.F.R. § 46.29(a)). See *FTC v. Morton Salt Co.*, 334 U.S. 37, 44–45 (1948) *Schlemmer v. Buffalo, Rochester & Pittsburg Ry. Co.*, 205 U.S. 1, 1((1907).

Moreover, respondent did not engage in averaging or pooling of sale within the meaning of 7 C.F.R. § 46.29(a). The averaging of sale referred to in the regulations permits consignees to report all of th sales of a lot of produce to the consignor at the average price receive for all the various sizes and/or grades contained in the lot, instead (itemizing the number of units sold at each price. Respondent did n(average the prices received for a lot and report a single, average pric(Rather, respondent reported itemized prices in its accounts of sal(purporting to set forth the exact number of units sold at each price.

The reference in the regulations to "pooling of sales" refers to tl practice of commingling shipments from several sellers of a particul commodity, e.g., apples, with sales from this inventory being reporte to the sellers on a pro rata basis depending on their share of the to(inventory. Such pooling continues until all of the produce so pooled sold.

In the case of averaging or pooling, the regulations require the co signee's records and accountings to be complete and accurate C.F R. §§ 46.2(y), .14, .15, .18–.23, .29). It would be an absu construction of the regulations to construe the averaging and pooli provisions to permit a consignor to render a detailed accounting sho ing (as in Transaction No. 1) the sale of 22 flats at $1, 41 at $.90, 83 $.85, and 334 at $.75, when, in fact, those exact quantities and pri were merely fairy-tale figures conjured up by respondent's employ(to make respondent appear to be a good salesman and to keep consignor happy.

Respondent contends (Appeal Brief at 3):

> Furthermore, a consignee or joint account partner need not maintain records of each and every box of produce dumped through resorting, reconditioning, returns and allowances if there is a specific agreement to the contrary between the parties. 7 C.F.R. 46.22.
>
> . . . In addition to the foregoing, if five percent or more of a shipment is dumped, an official certificate, or other adequate evidence, shall be obtained to prove the produce was actually without commercial value, unless there is a specific agreement to the contrary between the parties.

The first sentence of the regulation, which was omitted by res dent, disproves respondent's argument. The first sentence, whic

mediately precedes that quoted by respondent, is as follows (7 C.F.R. § 46.22):

> A clear and complete record shall be maintained showing justification for dumping of produce received on joint account, on consignment, or handled for or on behalf of another person if any portion of such produce regardless of percentage cannot be sold due to poor condition or is lost through resorting or reconditioning.

Under the plain terms of the regulation, a clear and complete record must be maintained as to all dumped produce that was received on joint account or consignment, irrespective of any agreement between the parties. An agreement between the parties can limit the evidence that must be obtained to prove that the produce was without commercial value, but it cannot relieve the consignee of the obligation to maintain a clear and complete record as to the dumping. Respondent admittedly did not maintain the required records as to its purported dumping of produce.

Similarly, irrespective of any agreement between the parties, any person receiving produce on consignment or joint account is required to keep complete and accurate records of any returns or allowances. Specifically, the regulations provide (7 C.F.R. § 46.21):

> § 46.21 Returns, rejections, or credit memorandums on sales.
>
> In the event of the rejection and return of any produce sold for or on behalf of another, on consignment, or on joint account, or of any necessary allowance or adjustment being made to the buyers thereof, a credit memorandum showing the buyer's name, sales ticket number, lot number, date of the granting of the allowance, and amount of the credit or adjustment, with reasons therefor, shall be made or a notation shall be made on the original sales ticket referring to the adjustment and showing where the credit memorandum is filed. The credit memorandum shall be on a regular form, in a ledger book, or on a sales ticket or invoice properly completed to show the facts and shall be approved by a duly authorized person. Credits granted shall be entered in the same records as the original sales tickets.

Respondent admittedly failed to keep such records and, in fact, as shown above, respondent's employees admittedly guessed at the amount of returns or allowances that would be made in the future, and used that estimate in fabricating the fairy-tale prices shown on respon-

cipals.

t even if it "technically violated the Act
o its accountings," the Act does not
etween parties as to the method of ac-
as required to prove that the shippers did
ccounting and payment" practiced by re-
). That argument is frivolous. The regu-
exact accounting as to consignment and

joint account transactions (7 C.F.R. §§ 46.2(y), .22, .29). The Act and regulations declared long before any contracts were entered into between respondent and its principals and joint account partners that it is unlawful in connection with any transaction subject to the Act "to fail or refuse truly and correctly to account" (7 U.S.C. § 499b(4)). Private parties do not have the power to annul an Act of Congress or valid regulations. *Cf. Chicago, Burlington & Quincy R.R. Co.* v. *Cram*, 228 U.S. 70, 85 (1913) (Art. I, § 10, cl. 1 of the Constitution prohibiting States from enacting a statute impairing the obligations of contracts (which prohibition has been held applicable to the Federal Government under the Due Process Clause of the Fifth Amendment) is inapplicable to contracts "made subsequently to the statute").

Respondent contends that the fairy tale told on its accountings to its principals and joint account partners had a happy ending, i.e., respondent contends that they received the full amount of money to which they were entitled.

Even if that were true, I would still revoke respondent's license for its admitted practice of rendering fictitious accountings during the 2 years involved in this proceeding. (In fact, Mr. Coby admitted that the practice was engaged in for 30 to 40 years (Tr. 286–87)). However, respondent's failure to maintain the required records prevents us from determining whether or not respondent actually paid its consignors and joint account partners the proper amount of money.

Because respondent failed to maintain the required records, complainant's investigators were forced to use an average sales price where respondent's sales records did not account for all of the produce received, i.e., complainant's investigators added an amount for unrecorded sales based on the weighted average price of the sales found by the investigators for the particular lot. Conversely, if respondent's records showed more sales for a particular lot than the amount of produce received in that lot, complainant's investigators eliminated the excess sales based on the average sales price for the lot.

The use of an average sales price was "approved" (in a limited sense) in *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1708–14 (1978), and *In re Kaplan's Fruit & Produce Co.*, 44 Agric. Dec. 333 , slip op. at 15–17 (Jan. 30, 1985), although it was recognized that the average

sales price tends to maximize estimates of underpayments.[9] Furthermore, here as in *Sallns* (37 Agric. Dec. at 1733 n.3) and *Kaplan's* (slip op. at 16), it is unnecessary to determine the exact amount of the underpayments.

In *In re De Graaf Dairies, Inc.*, 41 Agric. Dec. 388, 413-33 (1982), *aff'd*, No. 82-1157 (D.N.J. Jan. 24, 1983), *aff'd mem.*, 725 F.2d 667 (3d Cir. 1983), the court upheld a comparable method of estimating the obligations owed by a milk handler to the milk pool and for administrative assessments where the milk handler destroyed records that would have revealed its exact obligations. In that case, the Department proved that in 1975, the milk handler sold 1.8 million more pounds of milk than it reported as purchases. That amount was arbitrarily increased by the Judicial Officer by 5% "to cover any undiscovered sales" (41 Agric. Dec. at 413). In addition, the Judicial Officer estimated how much additional milk was obtained by the milk handler to cover the shrinkage associated with the bottling of the unreported sales in 1975 (41 Agric. Dec. at 413-14). The Judicial Officer then estimated the milk handler's additional obligations for the 6-year period from July 1968 through 1974 (in which there was some evidence that the handler underreported receipts, but no reliable evidence as to the extent of the underreporting) by inferring that the milk handler underreported during the earlier years in the same relative amount as estimated for 1975, i.e., the percentage figure obtained by dividing the 1975 unreported receipts by the 1975 reported receipts was applied to the reported receipts for each of the earlier years (41 Agric. Dec. at 415). As a result, the milk handler was required to pay additional obligations exceeding $480,000.

Similarly, in tax matters, it is well settled that the Internal Revenue Service may use averages or approximations in determining a person's

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[9] In *Kaplan's*, the Judicial Officer stated (slip op. at 16-17):

> However, I believe that where a licensee's records do not support its accountings to consignors, complainant should, *where practicable*, use judgment in determining underpayments, rather than follow an inflexible, average sales price approach. For example, if inspection reports show that a particular lot of produce in question was poor quality, and that all other produce on hand was high quality, complainant should exclude top sales figures that are obviously not from the lot in question. However, if the top sales prices were excluded when other poor quality produce was also on hand, an average determined by excluding the top sales prices might be too low, because the lowest figures included in the average might have been from other poor quality produce. Where the uncertainty is caused by a licensee's failure to handle fiduciary transactions as required by the Act and regulations, it is better to overestimate, *rather than underestimate*, the amount owed to consignors.
>
> The record here supports complainant's use of the average-sales-price approach. There is nothing in the record to suggest a more accurate, practical procedure.

income, where adequate records are not maintained. *Bradford* v. *CIR*, 796 F.2d 303, 304–06 (9th Cir. 1986) (court approved the Internal Revenue Service's use of a "weighted average" method to compute the cost of goods sold where the taxpayer had no records, and also approved the Tax Court's refusal to permit the taxpayer to deduct expenses where he had no evidence supporting such expenditures); *Calhoun* v. *United States*, 591 F.2d 1243, 1245 (9th Cir. 1978), *cert. denied*, 439 U.S. 1118 (1979) (Internal Revenue Service was compelled to compute the taxpayer's income by use of the "bank-deposit" method, i.e., adding together all bank deposits and only subtracting amounts which could be explained, e.g., transfers between accounts; it was the taxpayer's burden to show that the unexplained deposits were from a nontaxable source); *accord Adamson* v. *CIR*, 745 F.2d 541, 547–48 (9th Cir. 1984). As the court stated in *Webb* v. *CIR*, 394 F.2d 366, 373 (5th Cir. 1968):

> We recognize that the absence of adequate tax records does not give the Commissioner carte blanche for imposing Draconian absolutes. . . . But such absence does weaken any critique of the Commissioner's methodology. . . .
>
> Arithmetic precision was originally and exclusively in Webb's hands, and he had a statutory duty to provide it. . . . Having defaulted in his duty, he cannot frustrate the Commissioner's reasonable attempts by compelling investigation and recomputation under every means of income determination. Nor should he be overly chagrined at the Tax Court's reluctance to credit every word of his negative wails.

Respondent contends that the use of the average-sales-price approach is invalid because it was not published in the Federal Register. That contention is without merit. The record-keeping and accounting requirements applicable to respondent were published in the Federal Register. 7 C.F.R. §§ 46.2(y), (z), (aa), .14–.16, .18–.23, .29. It is only because respondent failed to comply with the published requirements that complainant's investigators were required to use the average-sales-price approach. It was not necessary to publish the average-sales-price approach in the Federal Register, in addition to the regulations that were published.

Respondent contends that complainant failed to prove that it failed to make full payment of the net proceeds for produce received on consignment or joint account because complainant did not ascertain all of the returns and allowances (Appeal Brief at 4–5). Respondent argues that the "record actually shows that respondent lost nearly 1.5 million dollars from 1982 to 1984 from returns, allowances and bad debts (R 16)" (Appeal Brief at 5).

In view of respondent's failure to keep the required records tying in any reductions, allowances, etc., to particular lots of produce, complainant was required as a practical matter to limit its audit of respondent's accounts receivable to a spot check of about five receivables

from each lot (Tr. 61–63, 79–81, 108–13, 123). To the extent that appropriate records as to returns, etc., were found, they were taken into consideration by complainant's investigators (Tr. 63, 86–92, 114–15; and see Tr. 134–35). Where respondent's failure to maintain required records precluded complainant, as a practical matter, from making a full audit of respondent's accounts receivable, respondent is in no position to complain about the inexactitude of the audit. Furthermore, respondent failed to trace even a single transaction to show that respondent fully paid its principals based on all the returns, allowances, etc.

Instead, respondent introduced general data showing that it had large losses from bad debts, returns and allowances. However, respondent's data are not persuasive.

Respondent's exhibit 16, relied upon by respondent (Appeal Brief at 5), showing bad debts totaling $280,281, and returns and allowances totaling $1,159,249, for calendar years 1982, 1983 and 1984, covers a 3–year period, whereas the complaint in this case covers a 2–year period. Moreover, the problem with respondent's exhibit is that it does not show whether any of the bad debts, returns, or allowances apply to any of the transactions at issue here. In fact, respondent failed to show even the extent to which the figures relied upon apply to respondent's consignment and joint account transactions, as distinguished from its purchase transactions.

Respondent's exhibit 17, which was rejected by the Administrative Law Judge, shows respondent's returns and allowances from September 1982 through August 1984. Although I will consider this as part of the evidence in the case (it is very similar to RX 16, discussed in the preceding paragraph), it has little weight since the returns and allowances are not tied in to any specific lot numbers. In fact, it cannot even be determined from the exhibit whether the deductions apply to joint account or consignment transactions, as distinguished from purchase transactions.

Similarly, respondent's exhibit 18, which was rejected, but which I will receive as general background evidence, is entitled to little weight since it merely shows that on one date not covered by the complaint, *viz.*, November 12, 1985, respondent had many accounts receivable due since prior to October 10, 1985.

Respondent's exhibits 20–22 are similarly of little or no weight in this proceeding. Respondent's exhibits 20 and 21 provide the underlying data for respondent's exhibit 22, which purports to set forth respondent's "Average Percentage Lost Per Month, May–Oct., 1985." The total average loss per month set forth on respondent's exhibit 22 is 11.84% (RX 22, 2nd page).

Aside from the fact that these exhibits are not based on the relevant time period, and are not limited to consignment transactions and joint

account transactions, as distinguished from purchase transactions, the exhibits admittedly refer only to the amount of loss *in those lots in which respondent experienced loss*. In other words, the exhibits relate to approximately 10% of respondent's total transactions during the time period covered by the exhibits (Tr. 276–78, 300–01, 305–10).[10] Accordingly, the total loss experienced by respondent during the period May–October 1985 on all of its receipts of produce during that time period would only be about 10% of the 11.84% shown on RX 22, or slightly in excess of 1% of respondent's total receipts.

Finally, respondent introduced letters from 17 of the 23 consignors and joint account partners involved in this case (all except Transaction Nos. 7–10, 13, 25, 47–48) in which the principals state that respondent "meticulously repacks and discards the bad fruit," we "have never required [respondent] to obtain a federal dump certificate," we "have always agreed that [respondent] would pay us according to the average sales obtained as soon after the receipt of the produce as possible," and we "request [respondent] to estimate the sales, taking into consideration the market and the quality and condition of the product and remit to us payment based on that estimate."

These letters were prepared by respondent's attorney (Tr. 299–300), and were retyped by the principals on their letterheads.

Most of them are verbatim, except for the opening paragraph setting forth how long they have been doing business with respondent. A few shippers shortened the letters or made minor changes. As stated with respect to similar unsworn statements relied upon by the respondent in *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2441 (1982), *aff'd*, 728 F.2d 347 (6th Cir. 1984):

> These statements, being unsworn and presumably prepared by respondent's counsel, have no probative value here. *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 746 (1982); and *see In re Ben Gatz Co.*, 38 Agric. Dec. 1038, 1044–45 (1979).

Moreover, as shown above, even if all of respondent's principals had personally testified in accordance with the views expressed in the letters prepared by respondent's counsel, that would be of no consequence here since private parties cannot annul the provisions of a Federal statute or regulations.

It is the policy of this Department to impose severe sanctions for serious violations of any of the regulatory programs administered by the

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[10] Respondent's total shipments received in selected months are as follows (Tr. 252; RX 15): 359 in March 1982; 408 in July 1982; 416 in October 1982; 546 in March 1983; 479 in July 1983; 520 in October 1983; 310 in March 1984; 495 in July 1984; and 502 in October 1984. Respondent had about the same number of shippers in 1985 (Tr. 245), which is the time period involved in respondent's exhibits 20–22. Respondent's exhibits 20–22 generally relate to about 20 to 30 shipments per month, or less than 10% of the total number of shipments shown on respondent's exhibit 15 as received during each of the selected months.

Department to serve as an effective deterrent not only to the respondents, but also to other potential violators. This policy has been followed in all of the Department's disciplinary proceedings in recent years.

The basis for the Department's severe sanction policy is set forth at great length in numerous decisions, *e.g.*, *In re Saylor*, 44 Agric. Dec. 2238, slip op. at 498–520 (Sept. 20, 1985) (decision on remand),[11] which is set forth as an appendix to this decision.[12]

In view of respondent's serious, flagrant and repeated violations of the Perishable Agricultural Commodities Act occurring over a 2-year period, the sanction recommended by complainant and imposed by the ALJ is fully justified.

Respondent's violations are particularly serious since they involve a violation of its fiduciary duty. As stated in *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1732–33 (1978), quoting from *In re Mandell, Spector, Rudolph Co.*, 24 Agric. Dec. 651, 695–96, 701 (1965), *aff'd sub*

[11] The Department's severe sanction policy did not originate with *Saylor*, but, rather, was mentioned briefly in the first decision issued by the present Judicial Officer, *In re Henner*, 30 Agric. Dec. 1151, 1263–64 (1971), and was further developed in numerous other decisions before it was virtually finalized in *In re Miller*, 33 Agric. Dec. 53, 64–80 (1974), *aff'd per curiam*, 498 F.2d 1088 (5th Cir. 1974). Slight revisions (mostly editorial) to the sanction policy were made in *Saylor*.

[12] Severe sanctions issued pursuant to the Department's severe sanction policy were sustained, e.g., in *In re Collier*, 38 Agric. Dec. 957, 971–72 (1979), *aff'd per curiam*, 624 F.2d 190 (9th Cir. 1980) (unpublished); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1362–63 (1978), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980); *In re Muehlenthaler*, 37 Agric. Dec. 313, 330–32, 337–52, *aff'd mem.*, 590 F.2d 340 (8th Cir. 1978); *In re Mid-States Livestock, Inc.*, 37 Agric. Dec. 547, 549–51 (1977), *aff'd sub nom. Van Wyk* v. *Bergland*, 570 F.2d 701 (8th Cir. 1978); *In re Cordele Livestock Co.*, 36 Agric. Dec. 1114, 1133–34 (1977), *aff'd per curiam*, 575 F.2d 879 (5th Cir. 1978) (unpublished); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1561 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Catanzaro*, 35 Agric. Dec. 26, 31–32 (1976), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 467 (1977); *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773, 75), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *In re M. & H. Produce* Dec. 700, 750, 762 (1975), *aff'd*, 549 F.2d 830 (D.C. Cir.) *cert. denied*, 434 U.S. 920 (1977); *In re Southwest Produce*, Dec. 160, 171, 178, *aff'd per curiam*, 524 F.2d 977 (5th Cir. *Acevedo & Sons*, 34 Agric. Dec. 120, 133, 145–60, *aff'd per* d 977 (5th Cir. 1975); *In re Marvin Tragash Co.*, 33 Agric. Dec. (1974), *aff'd*, 524 F.2d 1255 (5th Cir. 1975); *In re Trenton Live-*Dec. 499, 515, 539–50 (1974), *aff'd per curiam*, 510 F.2d published); *In re Miller*, 33 Agric. Dec. 53, 64–80, *aff'd* 388, 1089 (5th Cir. 1974).

nom. Mandell, Spector, Rudolph Co. v. *United States*, 364 F 2d 889 (3d Cir. 1966), *cert. denied*, 385 U.S. 1008 (1967):

> In addition, respondent was operating as a commission merchant or factor in consignment transactions and as a joint venturer in the joint account transaction, in both of which capacities respondent had a *fiduciary* duty to account truly and correctly, to keep adequate and accurate records identifying individual shipments of produce, to remit funds owing and not to commingle the goods of its principals or partners with its own or that of others. It is axiomatic that in this position of trust and confidence discrepancies or confusions created by respondent are to be resolved against it. * * *
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> * * *
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> In determining the sanction to be imposed herein, it must be kept in mind that the major violations of the act found herein, that is, the violations of section 2(4) thereof, are, in our opinion, the most serious and flagrant type possible under the act Such violations involve breaches of fiduciary duty by an agent to his principal and by a joint account partner to his joint venturer. The relationship of respondent to the shippers here was one of trust and confidence calling for a high degree of care, honesty and loyalty to the consignors and joint venturers

Also, as stated in *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1734 (1978):

> Respondent's recordkeeping violations, which are intertwined with respondent's accounting violations, are also serious violations of the Act inasmuch as accurate records are essential to effective enforcement of a Federal regulatory program. See, *e.g.*, *United States* v. *Ruzicka* 329 U.S. 287, 288–289; *United States* v. *Darby*, 312 U.S. 100, 124–125; *Electric Bond Co.* v. *Comm'n.*, 303 U.S. 419, 439, *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U.S. 194, 204–216; *Baltimore & Ohio RR.* v. *Interstate Com.*, 221 U.S. 612, 620–623; *Hyatt* v. *United States*, 276 F.2d 308, 312 (C.A. 10); *Panno* v. *United States*, 203 F.2d 504, 510 (C.A. 9); *United States* v. *Turner Dairy Co.*, 166 F.2d 1 (C.A. 7), certiorari denied, 335 U.S. 813; *United States* v. *Turner Dairy Co.*, 162 F.2d 425, 425–428 (C.A. 7), certiorari denied, 332 U.S. 836; *Bartlett Frazier Co.* v. *Hyde*, 65 F.2d 350 (C.A. 7), certiorari denied, 290 U.S. 654; *In re Breckenridge Auction & Sales Co.*, 36 Agric. Dec. 1522, 1529 (1977).

Most of respondent's alleged mitigating circumstances have bee considered above. In addition, respondent contends that it has nev been the subject of a disciplinary complaint before, and it has the hig est ratings in the industry's trade publications. However, that argume is not persuasive in view of the repeated and flagrant violations of r spondent's fiduciary duties over a 2-year period, and respondent's a mission that it engaged in the same course of conduct for 30 to 40 ye (Tr. 286–87). (The regulations requiring detailed and accurate countings were in effect for more than 20 years (28 Fed. Reg. 70 (1963)).

Respondent also contends that following USDA's audit, it took immediate action to correct its procedures. But respondent's corrective action comes far too late! "[I]t has been consistently held that evidence of current compliance with the Department's regulatory programs is totally irrelevant in determining the sanction for past violations." *In re Mountainside Butter & Egg Co.*, 38 Agric. Dec. 789, 800 (1978) (remand order), *final decision*, 39 Agric. Dec. 862, 863-64 (1980), *aff'd*, No. 80-3898 (D.N.J. June 23, 1982), *aff'd mem.*, 722 F.2d 733 (3d Cir. 1983), *cert. denied*, 104 S. Ct. 1417 (1984) [13]

Finally, respondent relies on the unsworn letters by the shippers stating that they want respondent to remain in business (RX 19). For the reasons set forth above, the unsworn letters prepared by respondent's attorney are not given any significant weight here. Moreover, this Department routinely denies requests for a lenient sanction based on the interests of respondent's customers, community or employees.[14] We are more concerned with the national interest of having fair conditions in the regulated industries than with the parochial interests of those immediately affected by a sanction imposed on a violator.

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[13] *Accord In re American Fruit Purveyors, Inc.*, 38 Agric. Dec. 1372, 1387-88 (1979), *aff'd per curiam*, 630 F.2d 370 (5th Cir. 1980), *cert. denied*, 450 U.S. 997 (1981), *In re L. R. Morris Produce Exch., Inc.*, 37 Agric. Dec. 1112, 1120 (1978); *In re Breckenridge Auction & Sales Co.*, 36 Agric. Dec. 1522, 1530 (1977); *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, 135, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re Miller*, 33 Agric. Dec. 53, 62, 81, *aff'd per curiam*, 498 F.2d 1088, 1089 (5th Cir. 1974), and *see In re Catanzaro*, 35 Agric. Dec. 26, 35 (1976), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467.

[14] *In re Blackfoot Livestock Comm'n Co.*, 45 Agric. Dec. 590 (Mar. 7, 1986), *appeal docketed*, No. 86-7198 (9th Cir. Apr. 16, 1986); *In re Gilardi Truck & Transp., Inc.*, 43 Agric. Dec. 118 (Jan. 27, 1984), *In re Oliverio, Jackson, Oliverio, Inc.*, 42 Agric. Dec. 1151, 1172 (1983); *In re Bananas, Inc.*, 42 Agric. Dec. 426, 426-27 (1983) (order denying intervention), *final decision*, 42 Agric. Dec. 588, 606 (1983); *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2441-42 (1982), *aff'd*, 728 F.2d 347 (6th Cir. 1984); *In re Powell*, 41 Agric. Dec. 1354, 1365 (1982); *In re VPC, Inc.*, 41 Agric. Dec. 734, 746 n.6 (1982); *In re Hatcher*, 41 Agric. Dec. 662, 670-71 (1982); *In re Gus Z. Lancaster Stock Yards, Inc.*, 38 Agric. Dec. 824, 825 (1979), *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1737-38 (1978); *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 302, 311, *aff'd mem.*, 582 F.2d 39 (5th Cir. 1978); *In re Cordele Livestock Co.*, 36 Agric. Dec. 1114, 1128-29, 1136 (1977), *aff'd per curiam*, 575 F.2d 879 (5th Cir. 1978) (unpublished); *In re Red River Livestock Auction, Inc.*, 36 Agric. Dec. 980, 989-90 (1977); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1562 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Overland Stockyards, Inc.*, 34 Agric. Dec. 1808, 1851-52 (1975); and *see In re L.R. Morris Produce Exch., Inc.*, 37 Agric. Dec. 1112, 1120-21 (1978); *In re Armour & Co.*, 37 Agric. Dec. 109, 112 (1978); *In re Catanzaro*, 35 Agric. Dec. 26, 34-35 (1976), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467 (1977).

For the foregoing reasons, the following order should be issued.

Order

Respondent's license is revoked.

The facts and circumstances set forth above shall be published.

This order shall become effective on the 30th day after service on respondent.

APPENDIX

Excerpt from *In re Saylor*, 44 Agric. Dec. 2238, slip op. at 498–520 (Sept. 20, 1985) (decision on remand).

U.S.D.A. Sanction Policy

[Excerpt omitted.—Editor]

In re: AL'S PRODUCE, INC. PACA Docket No. 2-7341. Decision and order filed December 31, 1986.

Failure to pay promptly—License revoked—Default.

Edward M. Silverstein, for complainant.

Respondent, *pro se*.

Decision issued by William J. Weber, Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499 *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on October 9, 1986, by the Acting Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period June 1985 through December 1985, respondent purchased, received and accepted, in interstate and foreign commerce, from six sellers, 128 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balances thereof in the total amount of $179,625.11.

A copy of the complaint was served upon respondent which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a default order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. 1.139).

Findings of Fact

1. Respondent, Al's Produce, Inc., is a corporation, whose address is 185 70th Street, Brooklyn, New York 11209.

2. Pursuant to the licensing provisions of the Act, license number 831623 was issued to respondent on September 30, 1983, was renewed annually, presently is in effect, and was next subject to renewal on or before September 30 , 1986.

3. As more fully set forth in paragraph 5 of the complaint, during the period June 1985 through December 1985 respondent purchased, received and accepted in interstate and foreign commerce, from six sellers, 128 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of $179,625.11.

Conclusions

Respondent's failure to make full payment promptly with respect to the 128 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of section 2 of the Act (7 U.S.C. 499b) , for which the Order below is issued.

Order

Respondent's license is revoked.

This order shall take effect on the eleventh day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings thirty-five days after service hereof, unless appealed to the Secretary by a party to the proceeding within thirty days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. 1.139 and 1.145).

Copies hereof shall be served upon the parties.

[This decision and order became final February 11, 1987.—Editor]

In re: ANTHONY TAMMARO, INC. PACA Docket No. 2-7006. Decision and order filed February 17, 1987.

Failure to pay promptly—Official notice taken of bankruptcy pleadings—No hearing required where record indicates no material issue of fact—License revoked.

The Judicial Officer affirmed Administrative Law Judge Palmer's order revoking respondent's license for failure to pay promptly and in full for over $400,000 worth of produce. This case is identical to *In re B.G. Sales Co.*, 44 Agric. Dec. 2021 (Oct. 9, 1985), which held that official notice is properly taken of bankruptcy pleadings, and no hearing is required where bankruptcy documents and the answer show that there is no material issue of fact. Excuses why full payment could not be made are routinely rejected. The Department imposes severe sanctions in the case of serious violations even though the violator's creditors will suffer, since the Department must consider the broader public interest, which is best served by imposing severe sanctions to serve as an effective deterrent to future violations.

Edward M. Silverstein, for complainant.

John Bracaglia, Jr., Somerville, New Jersey, for respondent.

Initial Decision by *Victor W. Palmer, Administrative Law Judge.*

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*),* in which Administrative Law Judge Victor W. Palmer (ALJ) filed an initial Decision and Order on August 4, 1986, revoking respondent's license for failure to pay promptly 19 sellers over $400,000 for 102 lots of produce from March 1984 through March 1985. Much (or, more likely, most) of that amount remains unpaid to this date.

On September 4, 1986, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 C.F.R. § 2.35).** On September 25, 1986, the case was referred to the Judicial Officer for decision.

Oral argument before the Judicial Officer, which is discretionary (7 C.F.R. § 1.145(d)), was requested by respondent, but is denied inasmuch as the issues are not novel or difficult, the case has been thoroughly briefed, and oral argument would seem to serve no useful purpose.

Based upon a careful consideration of the entire record, the initial Decision and Order is adopted as the final Decision and Order in this case (with a few trivial changes), except that the effective date of the

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* *See generally* Campbell, *The Perishable Agricultural Commodities Act Regulatory Program*, in 1 Davidson, Agricultural Law, ch. 4 (1981 and 1986 Cum. Supp.), and Becker and Whitten, *Perishable Agricultural Commodities Act*, in 10 Harl, Agricultural Law, ch. 72 (1980).

** The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c–450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

order is changed in view of the appeal. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on November 14, 1985, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period March 1984 through March 1985, respondent purchased, received and accepted, in interstate and foreign commerce, from 19 sellers, 102 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices or balances thereof in the total amount of $430,522.86. In addition, it is alleged that respondent failed to make full payment promptly to two sellers of the agreed total prices for 24 lots of perishable agricultural commodities purchased, received and accepted in interstate and foreign commerce, but that payment has been made,[1] albeit late, to these shippers after they initiated civil actions in the United States District Court for the District of New Jersey.

A copy of the complaint was served upon respondent, which filed an answer thereto in which it generally denied the material allegations in the complaint, admitted the allegations in the complaint regarding its bankruptcy filing, and stated several affirmative defenses. Complainant now has filed a motion for a decision generally based on respondent's admissions in its bankruptcy proceeding.[2] Based upon these admissions, the precedent which this forum is bound to follow [3] requires that

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[1] Full payment to one shipper was made in the amount of $257,228.30; the other shipper received $3,500 of $3,836 due for one shipment of tomatoes in a compromise settlement.

[2] Official notice is taken of the pleadings filed by the respondent in this proceeding designated as Case No. 85-01535, U.S. Bankr. Ct., D.N.J.

[3] *See Lane & Co., Inc.*, 44 Agric. Dec. ____ (PACA Docket No. 2-6547, December 4, 1984) (Ruling on Controlling Question).

complainant's motion be granted.[4] Therefore, upon the motion of the complainant for the issuance of a default order, the following Decision and Order is issued without further investigation or hearing pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, Anthony Tammaro, Inc., is a corporation, whose address is Post Office Box G, Robbinsville, New Jersey 08691.

2. Pursuant to the licensing provisions of the Act, license number 198634 was issued to respondent on October 16, 1982, was renewed annually, presently is in effect, and is next subject to renewal on or before October 16, 1987.

3. As more fully set forth in paragraph 5 of the complaint, during the period March 1984, through March 1985, respondent purchased, received and accepted in interstate and foreign commerce, from 19 sellers, 102 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, or balances thereof, in the total amount of $430,522.86.

4. As more fully set forth in paragraph 6 of the complaint, during the period December 1984, through March 1985, respondent purchased, received, and accepted in interstate and foreign commerce, from two sellers, 24 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment of the agreed purchase prices, or balances thereof, in the total amount of $261,066.30. These sellers perfected their interest in the PACA trust which respondent was required to maintain by Section 5(c) of the PACA (7 U.S.C. § 499e(c)) and initiated civil actions in the United States District Court for the District of New Jersey. As a result of these actions, payment was made in full for each of these transactions, except for one transaction with John Vena, Inc., Philadelphia, Pennsylvania, in which a compromise settlement of $3,500 was reached and paid.

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[4] In affirmative defense, respondent claims that the complaint "fails to state a cause of action upon which relief may be granted," however such an assertion is wholly without merit. *See* 7 U.S.C. § 499h. Citing several different sections thereof, respondent further claims that the complainant is barred by the Bankruptcy Code from bringing the instant action. Such an assertion is also without merit. *In re Fresh Approach, Inc.*, 49 B.R. 494 (Bankr. N.D. Tex. 1985). Further, respondent's assertion that it is only obligated to satisfy "duly perfected * * * [trust] claims" has no basis in the law. *See* 7 U.S.C. < 499b(4). In addition, respondent's claim that this action is barred by the applicable statute of limitations has no legal merit. *Melvin Beene Produce Co. v. Agricultural Marketing Serv.*, 728 F.2d 347 (6th Cir. 1984). Respondent's last two claims, that it will pay all creditors in accordance with an order of the bankruptcy court and that so long as it maintains sufficient trust assets to satisfy trust claims it cannot be held to violate the PACA are not defenses to an action for failure to make full and prompt payment under the Act. *Finer Foods Sales Co., Inc. v. Block*, 708 F.2d 774 (D.C. Cir. 1983).

Conclusions

Respondent's failure to make full payment promptly with respect to the 126 transactions set forth in Findings of Fact Nos. 3 and 4, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. §§ 499b), for which the Order below is issued. [5]

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

This case is identical, in all material respects, to *In re B.G. Sales Co.*, 44 Agric. Dec. 2021 (1985), a copy of which is attached as an appendix to this decision. In *B.G. Sales*, the following cases should be added to note 4, p. 5:

> *In re Walter Gailey & Sons, Inc.*, 45 Agric. Dec. 729 (1986); *In re Top Quality Fruit & Produce Distributors, Inc.*, 45 Agric. Dec. 326 (1986); *In re B.G. Sales Co.*, 44 Agric. Dec. 2021 (1985); *In re Kaplan's Fruit & Produce Co.*, 44 Agric. Dec. 2016 (1985).

Also, in the *B.G. Sales* decision, the following cases should be added to note 14, p. 12:

> *In re B.G. Sales Co.*, 44 Agric. Dec. 2021 (1985) (nonpayment because bank suddenly refused to extend credit as it agreed, and the bank took $50,000 of respondent's funds in the bank's possession); *In re Magic City Produce Co.*, 44 Agric. Dec. 1241 (1985), *aff'd mem.*, 796 F.2d 1477 (11th Cir. 1986) (nonpayment because respondent suffered about $200,000 in losses in 2-year period from theft of produce from his warehouse).

Respondent contends that its failures to pay were caused by the fact that its largest customer was a supermarket chain that developed its own ripening rooms, cutting out respondent as the middleman, and causing respondent a 40% loss of business. As stated in *B.G. Sales*, such excuses are rejected in the enforcement of the Perishable Agricultural Commodities Act.

The argument that creditors will suffer if respondent's license is revoked was rejected in *In re Gilardi Truck & Transportation, Inc.*, 43 [illegible]18 (1984), as follows (slip op. at 32-33):

> [illegible]nt argues that it would be detrimental to its credi[illegible] to discontinue business. Such arguments [illegible]utinely rejected. Even where credi[illegible]ally appear to urge the Department [illegible]ntinue in business, so that the viola[illegible]ditional payments to the creditors, [illegible]re such pleas for leniency made by

only after full consideration was given to ecision, respondent's memorandum of law However, the order that has been issued partment's sanction policy and the *Fava* ; in *Fresh Approach*, *supra*; *Melvin Been* , *supra*.

creditors since the Secretary must consider the broader public interest, involving thousands of suppliers and licensees throughout the country. [21] If lenient sanctions were imposed in the case of serious and flagrant violations of the Act for the benefit of a few of respondent's creditors, the sanctions would not have a strong deterrent effect and, therefore, such a policy would be contrary to the public interest.

Similarly, under all of the regulatory programs administered by the Department, any hardship to the respondent's community, customers or employees which might result from a disciplinary order is given no weight in determining the sanction, in order to protect the broader public interest, which is best served by imposing severe sanctions for serious or repeated violations, to serve as an effective deterrent to future violations. [22]

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[21] *In re Oliverio, Jackson, Oliverio, Inc.*, 42 Agric. Dec. [1151, 1170-72 (1983)]; *In re Bananas, Inc.*, 42 Agric. Dec 426, 426-27 (order denying intervention), *final decision*, 42 Agric. Dec. [588, 606 (1983)]; *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2441-42 (1982), *[aff'd*, 728 F.2d 347 (6th Cir. 1984)]; *In re V P.C., Inc.*, 41 Agric. Dec. 734, 746 n.6 (1982); *In re Catanzaro*, 35 Agric. Dec. 26, 34-35 (1976), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467.

[22] *In re Powell*, 41 Agric. Dec. 1354, 1365 (1982); *In re Hatcher*, 41 Agric. Dec. 662, 670-71 (1982); *In re Gus Z. Lancaster Stock Yards, Inc.*, 38 Agric. Dec. 824, 825 (1979); *In re Sol Salins, Inc.*, 37 Agric Dec. 1699, 1737-38 (1978); *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 302, 311, *aff'd mem.*, 582 F.2d 39 (5th Cir. 1978); *In re Cordele Livestock Co*, 36 Agric. Dec. 1114, 1128-29, 1136 (1977), *aff'd mem.*, 575 F 2d 879 (5th Cir. 1978); *In re Red River Livestock Auction, Inc.*, 36 Agric. Dec. 980, 989-90 (1977); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1562 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Overland Stockyards, Inc.*, 34 Agric. Dec. 1808, 1851-52 (1975); and *see In re L.R. Morris Produce Exch., Inc.*, 37 Agric. Dec. 1112, 1120-21 (1978); *In re Armour & Co.*, 37 Agric. Dec. 109, 112 (1978).

For the foregoing reasons, the following order should be issued in this proceeding.

Order

Respondent's license is revoked.

The facts and circumstances set forth above should be published.

This order shall become effective on the 30th day after service on respondent.

APPENDIX

In re B.G. Sales Co., 44 Agric. Dec. 2021 (1985).

[Copy omitted.—Editor]

REPARATION DECISIONS

MIDWEST MARKETING CO. *v.* RALPH & CONO COMMUNALE PRODUCE CO. PACA Docket No. 2-6728. Decision and order issued February 13, 1987.

Temporary rejection without reasonable cause—Acceptance at later date—Respondent liable for contract price less provable damages—Breach of contract, but no evidence submitted as to damages.

Complainant shipped two truckloads of watermelons to respondent. Respondent delayed acceptance. Complainant requested inspection, which was made four days after arrival. Although produce didn't meet contract terms, respondent presented no evidence of damages Respondent's defense fails, for lack of proof of damages

Allan R. Kahan, Presiding Officer.

Complainant, *pro se*.

Respondent, *pro se*.

Decision issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. § 499 et seq.). A timely complaint was filed in which complainant seeks a reparation award against respondent in the amount of $4,824.83, the balance due in connection with two transactions in interstate commerce involving two shipments of watermelons.

A copy of the formal complaint was served upon respondent and a copy of the report of investigation prepared by the Department was served on both parties. Respondent filed an answer to the complaint alleging that a substantial percentage of the melons were shown to have decayed upon inspection.

Since the amount claimed as damages did not exceed $15,000.00, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) was followed. Pursuant to this
the verified pleadings of the parties are considered part of
, as is the Department's report of investigation.
ere given the opportunity to submit further
' statements. On March 5, 1985, complain-
in Reply", containing further documents
hough given the opportunity to do so,

of Fact

ng Company, is a partnership com-
Randall Smith, and whose mailing
, Indiana 47591. At all times ma-
sed under the Act.
munale Produce Corp., is a corpo-
N.Y.C. Terminal Market, Bronx,

New York 10474. At all times material herein, respondent was licensed under the Act.

3. On or about June 19, 1984, complainant, by oral contract, sold two loads of U.S. No. 1 jubilee watermelons, which were shipped to respondent in two trucks: one truck containing approximately 1650 watermelons, and a second truck containing approximately 1400 watermelons, both loads at a price of $12.25 cwt., delivered.

4. The contract for the watermelons was negotiated by C.H. Robinson Company, New York City Terminal Market, Bronx, New York 10474.

5. On or about June 20, 1984, the two truckloads of watermelons were shipped, but both complainant and respondent agreed to an adjustment and reduction of price to $10.25 cwt., delivered, for both loads.

6. On Friday, June 22, 1984, both trucks arrived at the market where respondent was located – one arrived at approximately 8:30 a.m. and the second truck arrived at approximately 9:20 a.m. The complainant requested USDA inspection. C.H. Robinson called USDA and was informed that an inspection could not be made until Monday, June 25th.

7. The watermelons were not stored under temperature controlled conditions, nor were any protective actions taken to protect the melons from the heat, from the time of arrival at the terminal market, until inspection on June 26th.

8. The inspections of the watermelons were finally made on Tuesday, June 26, 1984, at 3:15 p.m. and 3:45 p.m. respectively. The inspections disclosed one load of watermelons had 10% bruised ends, and an average of 31% decay, blossom end rot and/or stem end rot in various stages. The other load of watermelons had 8% bruised ends and an average of 23% decay and blossom end rot and or stem end rot.

9. A formal complaint was filed on September 17, 1984, which was within nine months of when the causes of action stated herein accrued.

Conclusions

When the two loads of watermelons arrived at respondent's place of business, respondent did not reject the melons, but was unwilling to accept the melons on that Friday. Nothing in the record evidence would indicate any problem with the melons, nor any justifiable reason for not accepting the melons at that time. Had respondent been concerned about the condition of the produce, *respondent*, and not *complainant*, would have requested the inspection. Complainant, however, was the party requesting inspection on Friday, June 22. As the inspection was unable to be made on Friday, the trucks were parked in a holding area over the weekend. Respondent did not allow delivery of the melons until late Monday afternoon, June 25. Respondent refused to allow inspection of the melons at approximately 3:00 a.m. on Tues-

day morning. Inspection of the melons was finally made approximately twelve hours later, at 3:15 p.m. and 3:45 p.m. on Tuesday, June 26. Respondent accepted both truckloads of watermelons. Having accepted the produce, respondent is liable for the purchase price less any provable damages it may have sustained as a result of any breach of contract on the part of the complainant. *Edward Dilatush & Co. v. Sacks Bros. Wholesale Fruit and Produce, Inc.*, 20 Agric. Dec. 626; and *National Produce Distributors Inc. v. Harrisburg Daily Market, Inc.*, 19 Agric. Dec. 426. The burden of proof is upon respondent to show such breach and the resulting damages by a preponderance of the evidence. *Ontario Growers Exchange, Inc. v. Bronx Home Food Products"*, 18 Agric. Dec. 522.

Although respondent did not reject the two loads of melons, by its failure to accept them, respondent's action could be considered to be similar to a temporary rejection without reasonable cause. As there is no evidence to indicate any concern by respondent on the condition of the melons (respondent did not request inspection upon arrival), and there is evidence which plainly shows respondent attempting to unilaterally decrease the price of the melons, the logical inference is that respondent had no legitimate justification for refusing to accept the melons on Friday, June 22. Thus, the date of the delivery of the melons was on Friday, June 22, and the market value of the melons is to be determined from that date.

The undisputed facts indicate that both loads of melons were delivered on non-temperature controlled trucks. The inspections of Tuesday, June 26, indicate temperatures of from 80 to 84° in the trucks. Although such temperatures will result in more decay than maintaining the melons at cooler temperatures, the extensiveness of the decay found upon inspection would not be likely if the melons had graded U.S. 1 on Friday morning. Thus, although respondent permitted melons to stand an extra four days on the hot truck prior to inspection, the inspection constitutes a reliable indication of the condition of the melons on the date of delivery, Friday, June 22. Th e melons thus did not meet the grade contracted for.

The proper measure of damages for breach of warranty is the difference between the market value of the commodity if it had been as warranted and the market value of the commodity actually received, both values being calculated at the time and place of delivery. *William Hedburg, Inc. v. Edison Vegetable Growers, Inc.*, 10 Agric. Dec. 100; and *National Farms, Inc. v. Maine State Potato Co., Inc.*, 23 Agric. Dec. 1148.

Respondent has shown that complainant breached the contract by not delivering the quality product contracted for, but has submitted no evidence with respect to damages. Respondent, therefore, has failed to sustain its burden of proof with respect to damages resulting from the

breach by complainant. Accordingly, respondent's defense must fail for lack of proof of such damages. *Cooney & Korshak, Inc., v. The Pioneer Fruit and Commission Co.*, 24 Agric. Dec. 959.

The delivered contract price of the two truckloads of watermelon involved herein, as adjusted, is $9,960.95. Respondent has paid complainant $5,136.55, leaving a balance of $4,824.40. Respondent's failure to pay this sum to complainant is in violation of section 2 of the Act, for which reparation should be awarded with interest.

Order

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $4,824.40, with interest thereon at the rate of 13 percent per annum from August 1, 1984, until paid.

Copies of this order shall be served upon the parties.

MENDELSON-ZELLER CO., INC. *v.* TOM LANGE, CO., INC. PACA Docket No. 2-6999. Decision and order issued February 19, 1987.

Inspection—Suitable shipping condition warranty—Transportation service and conditions—Temperature tapes.

Where time between loading of cauliflower and inspection was five days, temperature at time of inspection was high, and respondent failed to submit tapes of temperature recorded during transit in F.O.B. transaction, high percent of decay cannot be ascribed to complainant so as to conclude that complainant breached the warranty of suitable shipping condition.

George S. Whitten, Presiding Officer.

Complainant, *pro se*

Respondent, *pro se*.

Decision issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et. seq.*). A timely complaint was filed in which complainant seeks an award of reparation against respondent in the amount of $4,328.10 in connection with the shipment in interstate commerce of a truck lot of cauliflower.

A copy of the report of investigation made by the Department was served upon the parties. A copy of the formal complaint was served upon respondent, which filed an answer thereto denying liability to complainant.

The amount claimed in the formal complaint does not exceed $15,000.00, and the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements, however, neither party did so. Neither party filed a brief.

Findings of Fact

1. Complainant, Mendelson-Zeller Co., Inc., is a corporation whose address is 450 Sansome Street, San Francisco, California.

2. Respondent, Tom Lange Co., Inc., is a corporation whose address is 3100 Produce Road, Houston, Texas. At the time of the transaction involved in this proceeding respondent was licensed under the Act.

3. On or about January 23, 1985, complainant sold to respondent one truck lot containing 624 cartons of cauliflower at $6.00 per carton, plus $.90 per carton for cooling and palletizing, and $22.50 for a Ryan temperature thermometer, or a total of $4,328.10, f.o.b. The truck completed loading of the cauliflower at 10:30 a.m. on January 24, 1985, and departed complainant's place of business to pick up other produce which respondent had contracted to purchase from other shippers. On the morning of January 25, 1985, 48 cartons of broccoli were loaded at Salinas, California, and 160 cartons of celery and 25 cartons of Bok Choy were loaded at Oxnard, California.

4. After arrival at respondent's place of business in Houston, Texas a federal inspection was made at 7:50 a.m. on January 29, 1985, of cauliflower still present on the truck. Such inspection showed in relevant part as follows:

Condition of Equipment: Temperature controls in operation.

. . .

Condition of Load: Partly unloaded, loaded to approximately 15 feet from rear, crosswise 2 row 13 layers. Pallitized, 2 pallets wide in trailer

. . .

Temperature of Product: In various locations 46 to 48° F.

Condition: Curds mostly [illegible], dark creamy, some white to light cream. Jacket leaves mostly fresh and green. Damage by mixed to black discoloration following bruising affecting curds ranges from 3 to 6 heads per carton, (25 to 50%) average 30%. Decay ranges 2 to 9 heads per carton, (17 to 75%), average 33% Bacterial Soft Rot mostly in early stages, generally affecting [illegible]

Remarks: Inspection and certification restricted to product and lading in upper 4 layers of pallets nearest rear doors.

Later in the day at 2:15 p.m. an unrestricted inspection was made the cauliflower while stacked in the cold room at respondent's place business. Such inspection showed temperatures at various locations 56°F. Condition was stated to be as follows: "Curds mostly light dark creamy, some white to light creamy. Jacket leaves mostly fre and green, some turning light yellow. From 17 to 33%, average 25 damage by brown to black discoloration. Decay ranges from 8 to 67% average 42% Bacterial Soft Rot, mostly in early, some in advanc stages."

5 On January 30, 1985, at 7:20 a.m., a federal inspection was ma of the celery while stacked in respondent's cold room. Such inspecti showed temperatures in various locations from 44 to 46°F. and no d cay. On January 30, 1985, at 8:50 a.m., a federal inspection was ma of the Bok Choy while stacked in respondent's cold room. Such i spection showed temperatures in various locations of 41°F. with conc tion stated as follows: "Generally fresh and crisp. Decay in most san ples none, in many 8%, average 3%, Gray Mold Rot, generally in ear stages." On January 30, 1985, at 9:45 a.m., the broccoli was federal inspected while stacked in respondent's cold room and showed ten peratures in various locations of 40°F. with no decay.

6. The formal complaint was filed on August 23, 1985, which wa within nine months after the cause of action herein accrued.

Conclusions

Complainant brings this action to recover the purchase price of th truck lot of cauliflower purchased and accepted by respondent. Th evidence shows that a Ryan temperature recorder was placed on boar the truck and was signed for by the truck driver. However, responder was unable to supply complainant with a copy of the tape from th recorder.

The federal inspections made at destination clearly show that th cauliflower was abnormally deteriorated on arrival. The Department' regulations (7 C.F.R. § 46.43(i) & (j)) provide that in an f.o.b. sal there is a warranty that the produce is put on board the agency c transportation at shipping point in suitable shipping condition, and tha the buyer assumes all risk of damage and delay in transit not caused b the seller irrespective of how the shipment is billed. The term "suitabl shipping condition" is defined as meaning that the commodity at tim of billing, is in a condition, which, if the shipment is handled unde normal transportation service and conditions, will assure delivery with out abnormal deterioration at the contract destination agreed upon be tween the parties. Since the subject cauliflower was abnormally dete riorated on arrival the only question for consideration here is whethe

transportation service and conditions were normal. We have held that the failure of a receiver who should have access to temperature tapes to offer the tapes in evidence is a factor to be considered in determining whether such receiver has met its burden of proving, after acceptance, that transportation service and conditions were normal. See *Louis Caric & Sons v. Ben Gatz Co.*, 38 Agric. Dec. 1486 (1979). See also *Monc's Consolidated Produce, Inc. v. A. &. J. Produce Corp.*, PACA Docket No. 2-6316, 43 Agric. Dec. 563 (1984).

Respondent contends that the absence of condition defects, or low condition defects, in the three other commodities is indicative of normal transportation for this truckload of produce. However, even different lots of the same commodity may not have the same keeping quality, although both would be considered in suitable shipping condition for transit to a given destination. The shipper here did not warrant that the cauliflower would keep as well as the broccoli under abnormal transit conditions. Rather, the warranty was that the cauliflower was in suitable condition to carry to contract destination without abnormal deterioration provided transaction service and conditions were normal. We do not mean to imply that the condition of the other commodities is irrelevant. Their condition is a factor to be considered, along with other factors, as an indication of whether transportation was normal, but always bearing in mind the above-mentioned caveat. In this case it is significant that the three remaining commodities were not placed on the truck until some 24 hours after the cauliflower. We do not know what conditions prevailed on the truck during that approximately 24 hour period. In addition, the temperatures noted in the two federal inspections of the cauliflower after arrival are high. See *Salinas v. Tom Lange Co.*, 41 Agric. Dec. 203 (1982). Moreover, the five day period of time between the loading of the cauliflower and the arrival inspection is excessive for a shipment from California to Texas. These factors along with respondent's failure to submit the Ryan tape, lead us to conclude that respondent has failed to meet its burden by proving by a preponderance of the evidence that transportation service and conditions pertaining to the cauliflower were normal. Consequently the warranty of suitable shipping conditions does not apply.

Since respondent accepted the cauliflower and has failed to prove a breach of contract on the part of complainant, respondent is liable to complainant for the full purchase price of the cauliflower, or $4,328.10. Respondent 's failure to pay complainant such amount is a violation of section 2 of the Act for which reparation should be awarded to complainant with interest.

It should also be noted that even had respondent proven a breach contract on the part of complainant, respondent did not prove damages in this case due to respondent's failure to submit an accounting covering the resale of the cauliflower.

Order

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, $4,328.10, with interest thereon at the rate of 18 percent per annum from March 1, 1985, until paid.

Copies of this order shall be served upon the parties.

GOLDEN EAGLE PRODUCE *v.* MELON PRODUCE, INC. PACA Docket No. 2-7393. Order issued February 19, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER REQUIRING PAYMENT OF UNDISPUTED AMOUNT

(Summarized)

Complainant seeks to recover $6,235.00 for potatoes sold to an accepted by respondent. Respondent's answer to the complaint admitted that $484.00 was due and owing to complainant.

Under the authority of section 7(a) of the Act (7 U.S.C. 499g(a)) respondent was ordered to pay complainant, as an undisputed amount $484.00 within 30 days plus 13 percent interest thereon per annum from March 1, 1986, until paid.

Respondent's liability for payment of the disputed amount is left for subsequent determination.

FRANK MINARDO, INC. *v.* INTERCOAST MARKETING, INC. PACA Docket No. 2-7397. Order issued February 19, 1987.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER REQUIRING PAYMENT OF UNDISPUTED AMOUNT

(Summarized)

Complainant seeks to recover $1,225.20 for cantaloupes sold to an accepted by respondent. In respondent's answer to the complaint, admission was made that $1,145.20 was due and owing to complainant.

Under the authority of section 7(a) of the Act (7 U.S.C. 499g(a)) respondent was ordered to pay complainant, as an undisputed amount $1,145.20 within 30 days, plus 13 percent interest thereon per annum from August 1, 1986, until paid.

Respondent's liability for payment of the disputed amount is left for subsequent determination.

INDEX MUTUAL ASSOCIATION *v.* WEINSTEIN PRODUCE SALES, INC. PACA Docket No. 2-7369. Order issued February 20, 1987.

Material allegations admitted.

Order issued by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

(Summarized)

In its answer to the complaint, respondent admitted the material allegations, including the indebtedness claimed by the complainant.

Respondent was ordered to pay complainant, as reparation, $620.00 plus 13 percent interest thereon per annum from May 1, 1986, until paid.

CASTELLINI COMPANY *v.* SAM COMPTON PRODUCE COMPANY, INC. PACA Docket No. 2-7395. Order issued February 20, 1987.

Material allegations admitted.

Order issued by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

(Summarized)

In its answer to the complaint, respondent admitted the material allegations, including the indebtedness claimed by the complainant.

Respondent was ordered to pay complainant, as reparation, $9,566.90, plus 13 percent interest thereon per annum from April 1, 1986, until paid.

UTING, INC. *v.* SAM COMPTON PRO-
)ocket No. 2-7398. Order issued Feb-

...aterial allegations admitted.

Order issued by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

(Summarized)

In its answer to the complaint, respondent admitted the material allegations, including the indebtedness claimed by complainant.

Respondent was ordered to pay to complainant, as reparation, $1,101.25, plus 13 percent interest thereon per annum from January 1, 1986, until paid.

ARIZONA PRODUCE CO., INC. *v.* PATRICIO A. PEREZ, d/b/a PEREZ PRODUCE CO. PACA Docket No. 2-7399. Order issued ruary 20, 1987.

Material allegations admitted.

Order issued by Donald A. Campbell, Judicial Officer.

REPARATION ORDER

(Summarized)

In its answer to the complaint, respondent admitted the material gations, including the indebtedness claimed by complainant.

Respondent was ordered to pay complainant, as repara $4,783.35, plus 13 percent interest thereon per annum from Ap 1985, until paid.

MISCELLANEOUS REPARATION ORDERS ISSUED BY DONALD A. CAMPBELL, JUDICIAL OFFICER

GRASSO FOODS, INC. *v.* THE QUAKER OATS COMPANY. PA Docket No. 2-6869. Order issued February 13, 1987.

Edward M Silverstein, Presiding Officer.

ORDER ON RECONSIDERATION

On October 3, 1986, an order was issued in this reparation proce ing under the Perishable Agricultural Commodities Act, 1930, amended (7 U.S.C. § 499a *et. seq.*), awarding reparation to the co plainant in the amount of $13,200.00 plus interest. The erroneo interest awarded in that order was corrected by order dated Octob 23, 1986. On November 5, 1986, the respondent filed a petition see ing reopening of the record and also seeking reconsideration of o decision. Respondent's petition was served upon complainant whi filed a response thereto. The issues raised in respondent's petition a discussed below.

In our October 3, 1986, decision, we concluded that, although t complainant had breached the parties' contract by shipping froze green peppers which failed to comply with the parties' contract becaus they were frozen in clumps rather than being free flowing, the respor dent had failed to prove that it had suffered any damages resulting fro that breach. Respondent now seeks a reopening of the record in orde to allow it to adduce such evidence. However, petitions to reopen ma only be filed prior to the issuance of a final order. *See* 7 C.F.R. 47.24(b). Thus, such a petition may not be entertained at this tim and such evidence "*** cannot be considered at this stage of the pro ceeding***." *Valley Packing Co. v. Demase & Manna*, 29 Agric. Dec 101 (1970) (Order on Reconsideration).

As one of its arguments on reconsideration, respondent claims that there is an inherent conflict in the definition, in the Department's regulations under the Act, of the term "acceptance." Thus, respondent claims that it is inconsistent for the regulations to define "acceptance" as the failure "to give notice of rejection ... within a reasonable time" (7 C.F.R. § 46.2 (dd)(3)) [1] at the same time the regulations define the term "acceptance" as "[a]ny act ... signifying acceptance of the shipment, including ... unloading" (7 C.F.R. § 46.2(dd)(1)). However, there is no inconsistency. Either of these two events will result in acceptance of the produce. Thus, unloading produce is "acceptance," *see Charles P. Tatt Fruit Co. v. Mac's Produce*, 9 Agric. Dec. 802, 805 (1950), and failing or refusing to accept or reject the load of produce is acceptance after the passage of a reasonable time . *See Pacific Lettuce v. M&C Produce*, 24 Agric. Den. 532 (1965). Therefore, contrary to respondent's assertions, there is no conflict between 7 C.F.R. §§ 46.2(dd)(1) and 46.2(dd)(3). The occurrence of either event, unloading or failure to take any act indicating acceptance or rejection, amounts to acceptance. It should be noted that respondent also errs in suggesting that 7 C.F.R. § 46.2 (dd)(3) provided it the opportunity to unload the frozen green peppers and still reject them within 12 hours of receipt. There is no such right. Once *any* act of acceptance occurs, a receiver loses its right to reject produce under the Act. But *see* our discussion of revocation of acceptance below.

In its petition, respondent also claims that, where the parties contemplated that produce would be unloaded before acceptance takes place, such an agreement supersedes the Department's regulations. There is no dispute regarding the kind of agreements into which the parties may enter. Of course, parties may bind themselves into any kind of agreement they choose. However, there is no evidence in the record by which [illegible] could conclude that the parties agreed that respondent might [illegible]en peppers and inspect them prior to acceptance. [illegible]ndent, *Pope Packing and Sales, Inc. v. Santa [illegible]p. Assn.*, 38 Agric. Dec. 101 (1979), is not [illegible]ere the produce was unloaded off the truck, [illegible] notified the seller of the rejection. [illegible]t to the request of the seller, in [illegible]nspection. Nothing like that

[1] [illegible]erm "[r]ejection without reason[illegible]hout legal justification to accept [illegible]at the regulations define the term [illegible]t in the instant case, as 12 hours

Respondent's last argument is that it revoked its acceptance of the frozen green peppers, pursuant to § 2-608 of the Uniform Commercial Code ("UCC"), after discovering that the green peppers failed to meet contractual requirements. Respondent makes this argument for the first time on reconsideration. Revocation of acceptance has been discussed in several prior decisions involving the Act. [2] Most notable of these decisions is *Highland Juice Co . v. T.W. Garner Food Co.*, 38 Agric. Dec. 1001 (1979). That case involved 200 drums of 1976 crop frozen, crushed Concord grapes which were supposed to be stemmed to allow use of respondent's pulper but which were not so stemmed. After concluding that respondent had accepted the grapes, we discussed respondent's claim that it had revoked its acceptance under UCC § 2-608. In that discussion we noted that, before a buyer could establish that it had revoked its acceptance, it would have to establish, by a preponderance of the evidence, the following:

> (1) That the produce failed to conform to the requirements of the parties' contract;
>
> (2) That its acceptance was based on the reasonable assumption that the nonconformity would be cured and it was not seasonably cured; or that it was induced to accept the produce without discovery of the nonconformity because of the difficulty of such discovery before acceptance or by the seller's assurances; and
>
> (3) That its revocation of acceptance was made within a reasonable time after it discovered the nonconformity and before any substantial change occurred in the produce which was not caused by their own defect

Once a proper revocation of acceptance
has the same rights and duties with r
they originally were rejected

Applying the above sta
that respondent did not, in fact, properly revoke its acceptance of the frozen green peppers as provided for in UCC § 2-608. While it is clear and undisputed that the frozen green peppers did not comply with the requirements of the parties' contract, this nonconformance could have been discovered by the simple expedient of opening a box or two of the green peppers before respondent had the entire load taken off the truck thereby accepting them. Under the circumstances, *i.e.*, complainant had shipped clump frozen green peppers to respondent during the previous shipping season, such an inspection would have been prudent. However, there is no evidence in the record that respondent made any attempt whatsoever to conduct such an inspection before unloading the peppers. In view of the failure by respondent to make

[2] *See, e.g., Pappageorge Prod. Co. v. Dixon Prod. Co.*, 33 Agric. Dec. 1160 (1974); and *Cal-Swiss Foods v. San Antonio Spice Co.*, 37 Agric. Dec. 1475 (1978).

any attempt to inspect the peppers before unloading them and the ease with which the nonconformance could have been discovered, *viz* only 13 of the 1,000 cartons shipped by complainant complied with the contract's specifications, we conclude that respondent's acceptance of the goods was not induced by the difficulty of discovering the nonconformance, as claimed by it on reconsideration, but rather was induced by its own negligence. Under these circumstances, we cannot hold that respondent established by a preponderance of the evidence that it had the right to revoke its acceptance.

We have reviewed this matter in the light of the respondent's petition for reconsideration and we are satisfied that our October 3, 1986, Decision and Order, as corrected on October 23, 1986, is amply supported by the evidence and the law applicable thereto. Accordingly, respondent's petition is dismissed.

The stay order of December 1, 1986, is vacated.

The order of October 3, 1986, as corrected on October 23, 1986, is reinstated, except that the reparation awarded therein shall be paid within 30 days from the date of this order.

Copies of this order shall be served upon the parties.

ANTLE BROTHERS and TANIMURA BROTHERS d/b/a TANIMURA and ANTLE v. ALBERTSON'S INC. PACA Docket No. 2-6989. Order issued February 13, 1987.

ORDER ON RECONSIDERATION

(Summarized)

The contentions of complainant, contained in its request for reconsideration, were considered and disposed of in the Decision issued previously. No reason is seen to change that determination. In cases of
" where complainant has the burden of persuasion, more
of is required than that which was provided by complainant.
' the above, complainant's request for reconsideration was

ICEBERG LETTUCE CORP., d/b/a RONALD G. MATLOCK, INC. *v.* KLEIMAN & HOCHBERG, INC. PACA Docket No. 2-7207. Order issued February 13, 1987.

ORDER OF DISMISSAL

(Summarized)

Complainant notified the Department that respondent tendered to complainant a check in full settlement of its claim and authorized dismissal of its complaint.

Respondent notified the Department that it no longer wished to proceed with its counterclaim and authorized dismissal of its counterclaim.

Accordingly, the complaint and counterclaim were dismissed.

RALPH JARSON *v.* AFFILIATED FOOD STORES, INC. PACA Docket No. 2-7234. Order issued February 13, 1987.

ORDER OF DISMISSAL

(Summarized)

Complainant notified the Department that settlement had been reached and authorized dismissal of its complaint.

Accordingly, the complaint was dismissed.

R.M. ALLRED and RONALD ALLRED d/b/a ALLRED'S PRODUCE *v.* RICHARD C. SHELTON, d/b/a MID-VALLEY BROKERAGE CO. PACA Docket No. 2-6967. Ruling issued February 18, 1987.

DENIAL OF PETITION TO REOPEN AND RULING ON RECONSIDERATION

(Summarized)

In his petition to reopen, respondent sought permission to add to the record a document which recently became known to him upon receiving it in the mail. The Rules of Practice clearly state that a petition to reopen and take further evidence must be filed prior to the issuance of a final order. Respondent's petition was denied because it was untimely filed.

In respondent's petition for reconsideration, he makes numerous claims in error, some based on the document he sought to introduce in his petition to reopen, which was denied, and therefore, cannot be considered. Respondent's other contentions were thoroughly dealt with in the Decision and Order previously issued. Therefore, the petition for reconsideration was without merit, and it was dismissed.

PERISHABLE AGRICULTURAL COMMODITIES ACT

L&J MARKETING CO. *v.* JERRY PEPELIS, d/b/a JERRY PEPELIS PACKING CO. PACA Docket No. 2-7291. Order issued February 18, 1987.

ORDER OF DISMISSAL

(Summarized)

Respondent tendered to complainant a check in full settlement of complainant's claim. Therefore, complainant authorized dismissal of its complaint.

Accordingly, the complaint was dismissed.

DECK PRODUCE COMPANY *v.* UNITED DISTRIBUTORS, INC. PACA Docket No. 2-6768. Order issued February 24, 1987.

REPARATION ORDER (Dismissal)

(Summarized)

Complainant notified this tribunal that the dispute involved has been amicably settled. Therefore, this proceeding may be dismissed.

This proceeding was dismissed.

DECK PRODUCE COMPANY *v.* UNITED DISTRIBUTORS, INC. PACA Docket No. 2-6962. Order issued February 24, 1987.

REPARATION ORDER (Dismissal)

(Summarized)

Complainant notified this tribunal that the dispute involved has been amicably settled. Therefore, this proceeding may be dismissed.

ding was dismissed.

NITED DISTRIBUTORS, INC. PACA
ebruary 24, 1987.

R (Dismissal)

e dispute involved has been
ng may be dismissed.

DE BRUYN PRODUCE CO. *v.* UNITED DISTRIBUTORS, INC. PACA Docket No. 2-6994. Order issued February 24, 1987.

REPARATION ORDER (Dismissal)

(Summarized)

Complainant notified this tribunal that the dispute involved has been amicably settled. Therefore, this proceeding may be dismissed.

This proceeding was dismissed.

REPARATION DEFAULT DECISIONS ISSUED BY DONALD A. CAMPBELL, JUDICIAL OFFICER

(Summarized)

L.A.W. POTATOES INC. *v.* PROVENCE PRODUCE. PACA Docket No. RD-87-87. Default order issued February 2, 1987.

Respondent was ordered to pay complainant, as reparation, $6,118.12 plus 13 percent interest theron per annum from March 1, 1986, until paid.

TULSA PRODUCE BROKERAGE COMPA
COMPANY *v.* DEWAYNE PROVENCE
PACA Docket No. RD-87-88. Default

Respondent was ordered
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1986, until paid.

L&J MARKETING CO. v. JERRY PEPELIS, d/b/a JERRY PEPELIS PACKING CO. PACA Docket No. 2-7291. Order issued February 18, 1987.

ORDER OF DISMISSAL

(Summarized)

Respondent tendered to complainant a check in full settlement of complainant's claim. Therefore, complainant authorized dismissal of its complaint.

Accordingly, the complaint was dismissed.

DECK PRODUCE COMPANY v. UNITED DISTRIBUTORS, INC. PACA Docket No. 2-6768. Order issued February 24, 1987.

REPARATION ORDER (Dismissal)

(Summarized)

Complainant notified this tribunal that the dispute involved has been amicably settled. Therefore, this proceeding may be dismissed.

This proceeding was dismissed.

)ECK PRODUCE COMPANY v. UNITED DISTRIBUTORS, INC. PACA)ocket No. 2-6962. Order issued February 24, 1987.

REPARATION ORDER (Dismissal)

(Summarized)

Complainant notified this tribunal that the dispute involved has been nicably settled. Therefore, this proceeding may be dismissed.

This proceeding was dismissed.

. UNITED DISTRIBUTORS, INC. PACA
sued February 24, 1987.

ER (Dismissal)

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ıe dispute involved has been
ing may be dismissed.

DE BRUYN PRODUCE CO. *v.* UNITED DISTRIBUTORS, INC. PACA Docket No. 2-6994. Order issued February 24, 1987.

REPARATION ORDER (Dismissal)

(Summarized)

Complainant notified this tribunal that the dispute involved has been amicably settled. Therefore, this proceeding may be dismissed.

This proceeding was dismissed.

REPARATION DEFAULT DECISIONS ISSUED BY DONALD A. CAMPBELL, JUDICIAL OFFICER

(Summarized)

L.A.W. POTATOES INC. *v.* PROVENCE PRODUCE. PACA Docket No. RD-87-87. Default order issued February 2, 1987.

Respondent was ordered to pay complainant, as reparation, $6,118.12 plus 13 percent interest theron per annum from March 1, 1986, until paid.

TULSA PRODUCE BROKERAGE COMPANY
COMPANY *v.* DEWAYNE PROVENCE d/
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Respondent was o
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1986, until paid.

PERISHABLE AGRICULTURAL COMMODITIES ACT

GOLDEN TRIANGLE PACKING CO. v. MORGANTOWN PRODUCE INC. PACA Docket No. RD-87-90. Default order issued February 2, 1987.

Respondent was ordered to pay complainant, as reparation, $14,110.57 plus 13 percent interest theron per annum from May 1, 1986, until paid.

CONSUMERS PRODUCE COMPANY INC. OF PITTSBURGH v. MORGANTOWN PRODUCE INC. PACA Docket No. RD-87-91. Default order issued February 2, 1987.

Respondent was ordered to pay complainant, as reparation, $72,723.13 plus 13 percent interest theron per annum from June 1, 1986, until paid.

BYRD AND FREDERICKSON INCORPORATED a/t/a B & F SALES v. INTERNATIONAL A. G. INC. PACA Docket No. RD-87-92. Default order issued February 3, 1987.

Respondent was ordered to pay complainant, as reparation, $3,800.00 plus 13 percent interest theron per annum from March 1, 1986, until paid.

NEW-GRO INC. a/t/a CENTRAL WEST PRODUCE v. INTERNATIONAL A.G. INC. PACA Docket No. RD-87-93. Default order issued February 3, 1987.

Respondent was ordered to pay complainant, as reparation, $8,458.40 plus 13 percent interest theron per annum from April 1, 1986, until paid.

& J MARKETING CO. v. B. H. COMPANY INC. PACA Docket No. D-87-94. Default order issued February 3, 1987.

Respondent was ordered to pay complainant, as reparation, $,842.80 plus 13 percent interest theron per annum from January 1, 86, until paid.

[illegible] v. B. H. COMPANY INC. [illegible] Default order issued February 3, [illegible]

Respondent was ordered to pay complainant, as reparation, $,727.00 plus 13 percent interest theron per annum from March 1, 86, until paid.

J. A. WOOD CO.-VISTA INC. a/t/a J. A. WOOD CO. *v.* B. H. COMPANY INC. PACA Docket No. RD-87-96. Default order issued February 3, 1987.

Respondent was ordered to pay complainant, as reparation, $20,993.80 plus 13 percent interest theron per annum from April 1, 1986, until paid.

BRADLEY PRODUCE COMPANY *v.* VINCENT D. MAENZA d/b/a VINCENT MAENZA BANANA CO. a/t/a MAENZA & SONS. PACA Docket No. RD-87-97. Default order issued Februray 5, 1987.

Respondent was ordered to pay complainant, as reparation, $3,698.30 plus 13 percent interest theron per annum from January 1, 1986, until paid.

DALE ALLEN TORBERT d/b/a TORBERT FARMS *v.* DAVIS DISTRIBUTORS INC. PACA Docket No. RD-87-98. Default order issued February 5, 1987.

Respondent was ordered to pay complainant, as reparation, $2,543.00 plus 13 percent interest theron per annum from August 1, 1985, until paid.

COLORADO POTATO GROWERS EXCHANGE *v.* JOSEPH J. STELLY d/b/a STELLY PRODUCE. PACA Docket No. RD-87-99. Default order issued February 5, 1987.

Respondent was ordered to pay complainant, as reparation, $10,795.00 plus 13 percent interest theron per annum from March 1, 1986, until paid.

KENNY'S PRODUCE INC. *v.* JOSEPH A. CUTTONE, JR. d/b/a JAC PRODUCE. PACA Docket No. RD-87-101. Default order issued February 5, 1987.

Respondent was ordered to pay complainant, as reparation, $47,399.00 plus 13 percent interest theron per annum from April 1, 1986, until paid.

ENDELSON-ZELLER CO. INC. *v.* CHINOOK MARKETING CO. INC. ACA Docket No. RD-87-102. Default order issued February 5, 987.

Respondent was ordered to pay complainant, as reparation, 11,420.65 plus 13 percent interest theron per annum from April 1, 986, until paid.

I GROUP INC. a/t/a GOURMET BRANDS, *v.* DEMPSEY-SPENCE NC. a/t/a SAN JACINTO PRODUCE COMPANY. PACA Docket No. D-87-103. Default order issued February 6, 1987.

Respondent was ordered to pay complainant, as reparation, 1,760.63 plus 13 percent interest theron per annum from December 1985, until paid.

SCO FOOD SERVICES INC. *v.* E & S PRODUCE. PACA Docket No.)-87-104. Default order issued February 6, 1987.

espondent was ordered to pay complainant, as reparation, 681.71 plus 13 percent interest theron per annum from November 1985, until paid.

RAKAMI FARMS INC. a/t/a MURAKAMI PRODUCE CO. *v.* JOE TO & SON INC. PACA Docket No. RD-87-105. Default order ed February 6, 1987.

spondent was ordered to pay complainant, as reparation, 109.16 plus 13 percent interest theron per annum from December 985, until paid.

DUCE CO. *v.* UNION PRODUCE DISTRIBUTORS. PACA)-87-106. Default order issued February 6, 1987.

as ordered to pay complainant, as reparation, percent interest theron per annum from March 1,

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& L DISTRIBUTORS INC.
ler issued February 6,

inant, as reparation,
nnum from January 1,

D-N-E SALES INC. *v.* SAM COMPTON PRODUCE COMPANY INC. PACA Docket No. RD-87-108. Default order issued February 6, 1987.

Respondent was ordered to pay complainant, as reparation, $11,501.95 plus 13 percent interest theron per annum from January 1, 1986, until paid.

I. A. WROTEN CO. *v.* JAMES A. GUY d/b/a JIM'S CARTAGE SERVICE. PACA Docket No. RD-87-100. Default order issued February 9, 1987.

Respondent was ordered to pay complainant, as reparation, $8,034.20 plus 13 percent interest theron per annum from July 1, 1986, until paid.

ONEONTA TRADING CORPORATION *v.* GORE & FRANK INC. PACA Docket No RD-87-109. Default order issued February 9, 1987.

Respondent was ordered to pay complainant, as reparation, $25,744.55 plus 13 percent interest theron per annum from June 1, 1986, until paid.

BORTON & SONS INC. *v.* CHINOOK MARKETING CO. INC. PACA Docket No. RD-87-110. Default order issued February 9, 1987.

Respondent was ordered to pay complainant, as reparation, $65,770.85 plus 13 percent interest theron per annum from April 1, 1986, until paid.

R. B. PACKING INC. *v.* UNION PRODUCE DISTRIBUTORS. PACA Docket NO. RD-87-112. Default order issued February 9, 1987.

Respondent was ordered to pay complainant, as reparation, $973.90 plus 13 percent interest theron per annum from January 1, 1986, until paid.

BROWN & LOE INC. *v.* SIDNEY M. WOLFE d/b/a W. W. TOMATOE CO. formerly WILDEROM TOMATO HOUSE. PACA Docket No. RD-87-113. Default order issued February 11, 1987.

Respondent was ordered to pay complainant, as reparation, $2,067.05 plus 13 percent interest theron per annum from November , 1985, until paid.

VEG-PAK INC. v. PATRICIA A. MCCULLOUGH d/b/a PAT'S PRODUCE. PACA Docket No. RD-87-114. Default order issued February 11, 1987.

Respondent was ordered to pay complainant, as reparation, $3,021.90 plus 13 percent interest theron per annum from September 1, 1985, until paid.

BARBARA J. SMITH and DON R. SMITH d/b/a EAGLE BROKERS v. JACQUELINE I. VANDENBRINK and KEVIN S. VANDENBRINK d/b/a VALLEY PRODUCE. PACA Docket No. RD-87-115. Default order issued February 11, 1987.

Respondent was ordered to pay complainant, as reparation, $5,449.52 plus 13 percent interest theron per annum from March 1, 1986, until paid.

SUNSPROUTS OF TEXAS INC. v. DEMPSEY-SPENCE INC. a/t/a SAN JACINTO PRODUCE COMPANY. PACA Docket No. RD-87-116. Default order issued February 11, 1987.

Respondent was ordered to pay complainant, as reparation, $5,480.20 plus 13 percent interest theron per annum from January 1, 1986, until paid.

VAL-MEX FRUIT COMPANY INC. v. DEWEY H. BOYD d/b/a DIXIE PRODUCE SALES. PACA Docket No. RD-87-117. Default order issued February 11, 1987.

Respondent was ordered to pay complainant, as reparation, $222.63 plus 13 percent interest theron per annum from April 1, 1986, until paid.

MARKETING ASSOCIATES INC. v. DEWEY H. BOYD d/b/a ...S. PACA Docket No. RD-87-118. Default or-
1987

...mplainant, as reparation, $77.40
...num from December 1, 1985,

GWIN WHITE & PRINCE INC. *v.* CHINOOK MARKETING CO. INC. PACA Docket No. RD-87-119. Default order issued February 27, 1987.

Respondent was ordered to pay complainant, as reparation, $19,360.40 plus 13 percent interest theron per annum from April 1, 1986, until paid.

D & D FARMS INC. *v.* VINCENT D. MAENZA d/b/a/ VINCENT MAENZA BANANA CO. a/t/a MAENZA & SONS. PACA Docket No. RD-87-120. Default order issued February 27, 1987.

Respondent was ordered to pay complainant, as reparation, $3,246.50 plus 13 percent interest theron per annum from February 1, 1986, until paid.

ELMORE & STAHL INC. *v.* VINCENT D. MAENZA d/b/a VINCENT MAENZA BANANA CO. a/t/a MAENZA & SONS. PACA Docket No. RD-87-121. Default order issued February 27, 1987.

Respondent was ordered to pay c
$16,651.05 plus 13 percent interest theron
1986, until paid.

PERISHABLE AGRICULTURAL COMMODITIES ACT

OE GENOVA & ASSOCIATES, INC. v. INTERNATIONAL A.G., INC. 'ACA Docket No. RD-87-82. Order issued February 23, 1987.

ORDER OF DISMISSAL

(Summarized)

Complainant authorized dismissal of its complaint filed herein. Accordingly, the complaint was dismissed.

'OM LANGE COMPANY INC. v. MELON PRODUCE INC. PACA)ocket No. RD-86-398. Ruling and Order issued February 25,1987.

RULING ON ORDER TO SHOW CAUSE AND ORDER DENYING MOTION TO REOPEN, VACATING STAY AND REINSTATING DEFAULT ORDER

(Summarized)

Complainant, in its response to the Order to Show Cause, claimed at the District Court case was not brought against respondent for the aim asserted in this reparation action. Review of the documentation bmitted by the parties tended to support complainant's position. ierefore, there was no basis for dismissing the complaint.

Respondent's belief that it was restrained from paying any money to mplainant is irrelevant to its obligation to file an answei, which would t require the payment of money. The alleged confusion resulting m respondent's representation by more than one law firm is not a itimate excuse for respondent's failure to file a timely answer.

Therefore, respondent's motion to reopen after default was denied, Stay Order was vacated and the Default Order previously issued was istated. The amount awarded, including interest, was ordered paid hin 30 days from the date of this Order.

LOI POTATO CO. INC. v. EHRLICH PRODUCE CORP. PACA Docket No. RD-87-58. Order issued February 25, 1987.

ORDER OF DISMISSAL

(Summarized)

Respondent, in its motion to reopen after default, claimed that complainant had filed a similar action against it in a state court.

Accordingly, the complaint was dismissed.

Complainant was ordered to show cause why its complaint should not be dismissed pursuant to section 5(b) of the Act (7 U.S.C. § 499e(b)), due to the apparent concurrent maintenance of this reparation proceeding and a court action. Complainant did not respond.

In re: M. HOWORTH. P.Q. Docket No. 286. Order filed February 20, 1987.

Clement McGovern, for complainant.

Respondent, *pro se*.

Order issued by Edward H. McGrail, Administrative Law Judge.

ORDER DISMISSING COMPLAINT

For good cause shown in complainant's motion, filed February 19, 1987,

IT IS ORDERED, that the complaint issued in this matter on November 18, 1986, be, and is, dismissed with prejudice.

In re: PAULING AUTAR. P.Q. Docket No. 219. Order filed February 24, 1987.

Clement McGovern, for complainant

Respondent, *pro se*

Order issued by Edward H. McGrail, Administrative Law Judge.

ORDER DISMISSING COMPLAINT

For good cause shown in complainant's motion, filed February 20, 1987, IT IS ORDERED, that the complaint issued in this matter on March 17, 1986, be, and hereby is, dismissed with prejudice.

In re: JOHN RYNAN. P.Q. Docket No. 297. Order filed February 26, 1987.

Clement McGovern, for complainant

Respondent, *pro se*.

Order issued by Victor W. Palmer, Administrative Law Judge.

DISMISSAL

For good cause shown the complaint filed in the above case is hereby dismissed.

In re: ERICKSEN GRAIN ELEVATOR, INC. USWA Docket No. 85-1
Decision and order filed January 7, 1987.

Failure to appear at hearing—Required increase in bond—Discrepancy corn in storage—Permanent revocation of license—Default.

John Lom, for complainant.

Respondent, *pro se*.

Decision issued by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

Preliminary Statement

This is a proceeding under the United States Warehouse Act, a amended (the Act) (7 U.S.C. 241 *et seq.*), instituted by a complai filed by the Administrator, Agricultural Stabilization and Conservatic Service (ASCS), United States Department of Agriculture, chargi that the respondent willfully violated the Act and regulations promu gated thereunder. 7 CFR Parts 735–743.

Copies of the complaint and Rules of Practice (7 CFR 1.130 *et seq* governing proceedings under the Act were served upon respondent l the Hearing Clerk by certified mail. Respondent was informed in letter of service that an answer should be filed pursuant to the Rules Practice and that failure to answer would constitute an admission of the material allegations contained in the complaint.

Respondent filed an answer within the time prescribed in the Rules Practice and requested an oral hearing which was scheduled for Oc ber 7, 1986, in Omaha, Nebraska. The respondent failed to appe The material facts alleged in the complaint, as supported by the e dence submitted by the complainant (Administrative Record, Exhibi at the October 7 hearing, are admitted by respondent's failure to a pear and are adopted and set forth herein as Findings of Fact (7 C 1.139 and 1.141).

This decision and order, therefore, are issued pursuant to secti 1.142(b) and (c) of the Rules of Practice. 7 CFR 1.142.

1. The respondent is, and at all times material herein was, an Ic corporation which operates a grain warehouse located at P.O. Box 2 311 Poplar Street, Salix, Iowa 51052.

2. The respondent license no. 3-7927 issued under the Act.

3. The regulations at 7 CFR 736.6(d) provide that no person may licensed as a warehouseman unless he has allowable net assets to extent of at least $25,000 or 20 cents per bushel for the maxim number of bushels of grain storage capacity. The regulations also p vide that in case of a deficiency in net assets above the minimum quired by 7 CFR 736.6(d), the bond requirement shall be increased CFR 736.14(c).

4. The Act (7 U.S.C. 247) requires that the warehouseman po bond in the amount required by the Secretary within the time fixe

the Secretary and provides for revocation of the warehouseman's license under the Act for failure to do so.

5. On or about April 18, 1985, respondent was requested by certified mail to increase the sum of the warehousemen's bond from $47,000 to $67,000 to cover a deficiency in allowable net worth. Respondent was again advised on or about May 20, 1985, by certified mail, that if the requested bond agreement was not received by June 17, 1985, action would be initiated to revoke the license pursuant to 7 CFR 736.9(h).

6. Under regulations promulgated by the Act warehousemen must keep stocks of grain in storage by grades in balance with the grades represented by outstanding storage obligations for which receipts have been or are to be issued. 7 CFR 736.51.

7. On or about January 18, 1985, an examination of respondent's warehouse revealed a deterioration in the quality of corn in storage. The examination revealed a discrepancy of 69,516 bushels of No. 2 Yellow Corn. The respondent was advised of this violation in writing on January 22, 1985, but failed to correct this grade imbalance within the time allowed by the Secretary.

8. On or about April 25, 1985, an examination of respondent's warehouse revealed deterioration in the quality of corn in storage. The examination revealed a discrepancy of 46,976 bushels of No. 2 Yellow Corn. The respondent was advised of this violation in writing on April 26, 1985, but failed to correct this grade imbalance within the time allowed by the Secretary.

Conclusions

1. On August 26, 1985, the respondent was served a complaint filed by the Administrator, ASCS, to permanently revoke respondent's license which was issued under the Act.

2. Respondent answered the complaint and a hearing was scheduled for October 7, 1986, in Omaha, Nebraska.

3. The regulations at 7 CFR 736.9 provide that a license issued to a warehouseman may be revoked, after an opportunity for a hearing, if the warehouseman has in any manner violated or failed to comply with any provisions of the Act or the regulations thereunder.

4. The respondent failed to appear at the October 7, 1986 hearing.

5. Pursuant to 7 U.S.C. 246, the violations alleged in paragraphs 1–8 of the Findings of Fact, as supported by the evidence introduced by the complainant (Administrative Record, Exhibit 1), are grounds for the revocation of U.S. Warehouse Act license number 3–7972 which was issued to the respondent.

Order

nse no. 3–7972 issued under the Act to the respondent is ermanently revoked and any other license issued under the ich the respondent has any authority or financial interest is

also revoked because of the violations as stated n paragraphs 1–8 of the Findings of Fact and paragraphs 1–5 of the Conclusions, above.

2. The provisions of this order shall become effective on the first day after this decision becomes final. Copies hereof shall be served upon the parties.

3. Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice (7 CFR 1.130 *et seq.*).

[This decision and order became final February 17, 1987.—Editor]

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